83-321

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GUY WALLER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
STATE OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether closure and exclusion of the public from portions of a defendant's trial for seven days, over the opposition of the defendant and without any showing by the prosecution that closure was necessary to achieve an overriding governmental interest, violates the Sixth Amendment to the Constitution of the United States.

2. Whether O.C.G.A. §16-14-7(f) (formerly Ga. Code Ann. §26-3405(d)(2)) facially violates the Fourth and Fourteenth Amendments to the United States Constitution, because it delegates to the police officers executing a search warrant unbridled discretion to search for and seize anything they choose to seize.

Subsumed under this question is whether the searches and seizures, as conducted in this case under the authority of that statute, were general.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Guy Waller, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia, entered on June 1st, 1983, and the denial of a timely motion for a rehearing, entered on June 28th, 1983.

OPINIONS BELOW

The Supreme Court of the State of Georgia entered its opinion affirming the Petitioner's convictions on June 1st, 1983. Petition for rehearing was denied on June 28th, 1983. A copy of the opinion, as yet unreported, is attached

as Appendix A. A copy of the Order denying the petition for rehearing is attached as Appendix B.

The decision of the trial judge of the Superior Court of Fulton County, Atlanta Judicial Circuit, granting the State's motion for closure was oral and unreported. A copy of portions of the transcript of the hearing held before the trial court at which the oral decision of closure was announced is set out in Appendix C. The State's motion for closure filed on June 14, 1982 is attached as Appendix D.

JURISDICTIONAL STATEMENT

Since this petition is being filed within sixty (60) days from June 28th, 1983, it is timely.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). Moreover, because the constitutionality of O.C.G.A. §16-14-7(f) (formerly Ga. Code Ann. §26-3405(d)(2)) is drawn in question, 28 U.S.C. §2403(b) may be applicable.

RAISING THE FEDERAL QUESTIONS

A. CLOSURE

After a jury was selected, it was excused in order that the court conduct a lengthy (7 days) evidentiary hearing on the Motion to Suppress wiretaps. Preliminary thereto, the court considered the state's motion (filed the week before) to close the courtroom during the evidentiary hearing. At the earliest possible moment petitioners' counsel "vehemently" opposed closure, "insist[ing] on our constitutional right to an open trial." S.T. 11.*

*S.T. ____, refers to the pagination of the Suppression Transcript.

Petitioners' counsel requested that, in any event, "several people who are vitally important to me" be permitted to remain in the courtroom in order to "effectively render assistance of counsel." (S.T. 12-13).

The court would not allow them to remain since they were not "officer(s) of the Court." (S.T. 13). And even though the state did not object to defense counsel's secretary remaining, she, too, was excluded. (S.T. 15).

The same constitutional claim was twice (on the direct appeal and on the petition for rehearing) asserted in the Supreme Court of Georgia. The federal constitutional claim was expressly denied by the Supreme Court of Georgia: "We find that appellants' Sixth Amendment right to a public trial was not violated." (App. A-5).

It is review of that denial which is here sought.

B. UNCONSTITUTIONALITY OF THE STATUTE

From the return of the indictment to the bitter end (the Petition for Rehearing), the Petitioners repeatedly and vigorously attacked then §26-3405(d)(2) Ga. Code Ann. (now O.C.G.A. 16-14-7(f)). In the Motion to Suppress, for example, the Petitioners said:

> (23) Searches conducted under the authority of §26-3405(d)(2), Ga. Code Ann. are violative of the Fourth and Fourteenth Amendments to the United States Constitution in that it authorizes unbridled seizures by the officers conducting the search without the interposition of judicial control or restraint.

The Supreme Court rejected the Fourth and Fourteenth Amendment attacks and held the statute constitutional facially (App. A-2) and as applied (App. A-3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, in pertinent part, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . .

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution, in pertinent part, provides:

> Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law. . . .

STATUTE INVOLVED

O.C.G.A. §16-14-7(f) (formerly §26-3405(d)(2) Ga. Code Ann.), in pertinent part, provides:

> Seizure may be effected by a law enforcement officer authorized to enforce the penal laws of this state prior to the filing of the complaint and without a writ of seizure if the seizure is incident to lawful arrest, search, or inspection *and the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if not seized* . . . (emphasis added).

REASONS FOR GRANTING THE WRIT

The first question presented by this petition requires the attention of this Court in order to ensure that rights guaranteed by the Sixth and Fourteenth Amendments to the Constitution are not compromised by failure to comply with the principles of law this Court announced in *In re Oliver*, 333 U.S. 257, *Globe Newspaper Co. v. Superior Court*, 102 S.Ct. 2613, *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, and *Gannett Co. v. De Pasquale*, 443 U.S. 368.

That question deals with the right of an accused to a public trial – a right so firmly engrained in our notions of ordered liberty that it stands among the very few of the absolutes contained in the Bill of Rights to which this Court, despite the passage of nearly 200 years, has never squarely announced an exception. This Court recently said that "in *criminal trials* in particular" there is a presumption of openness harking back to "the time when our organic laws were adopted . . . both here and in England," *Globe Newspaper Co. v. Superior Court*, 102 S.Ct. 2613 (emphasis the Court's). That "presumption was so solidly grounded" at the time of this Court's decision in *In re Oliver*, 333 U.S. 257, that this Court was "unable to find a single instance of a criminal trial conducted *in camera* in any federal, state, or municipal court during the history of this country." *Globe Newspaper Co. v. Superior Court*, Idem, citing *In re Oliver* at 266.

Considering, then, "our long history of open criminal trials and the special value, for both public and the accused, of that openness," *Globe Newspaper Co. v. Superior Court*, 102 S.Ct. 2613 (O'Conner, J., concurring in the judgment), it would seem that a criminal trial may not be closed, in whole or in part, *over the defendant's objection*

unless closure is inescapably necessary to safeguard a state interest of the highest order, unless there are no less drastic methods available for pursuing that interest and unless it is clearly demonstrated that closure will guard against the perceived danger. See *Gannett Co. v. De Pasquale*, 443 U.S. 368, 441-42, (Blackmun, J., concurring in part and dissenting in part).

Although the court below identified a number of interests which, arguably, might be sufficient to justify closure, it swept aside this Court's carefully drawn, stringent procedural requirements announced in *Richmond Newspapers* as if they didn't count. As for the trial court, it conducted no hearing, no balancing act, articulated no findings, did not even consider *Richmond Newspaper's* procedural requirements; it simply slammed shut the courtroom doors and kept them closed for 7 days over petitioner's futile protests. (See S.T. 11-16, Appendix C).

The failure of Georgia's Supreme Court to apply *Richmond Newspaper's* procedural guidelines is troublesome because it creates uncertainty over the parameters of an important constitutional right in the context of the Sixth Amendment. To the extent that that uncertainty gives rise to the likelihood of erroneous decisions in future cases, its very existence is inconsistent with the Sixth Amendment.

ARGUMENT

A.

THE INTERESTS IDENTIFIED BY THE COURT BELOW WERE INSUFFICIENT TO JUSTIFY CLOSURE IN THIS CASE.

The Georgia Supreme Court held:

> In the hearing here, information was revealed

> which was potentially harmful to others, and might prejudice other potential defendants. Under these circumstances, the court balanced appellants' rights to a public hearing on the motion against the privacy rights of others and closed the hearing. The court exercised its inherent power ". . . to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice." *Lowe v. State*, 141 Ga. App. 433, 435 (233 S.E. 2d 807) (1977). We find that appellants' Sixth Amendment right to a public trial was not violated.

(Appendix A-4, 5)

Each of the goals articulated by the court below is certainly a worthy one. At the outset, however, the fundamental problem with the first three stems from their potentially limitless application and from their focus on concerns tangential to the central purpose of a criminal trial. The theory, for example, that "information was revealed which was potentially harmful to others, would tend to violate the privacy of others, and might prejudice other potential defendants," is not a theory which logically limits itself to this case. *Every* case *may* contain information potentially harmful to others; *every* case *might* prejudice other potential defendants. If the goals articulated by the court below were permitted to serve as the foundation for a closed trial, public trials soon would become a thing of the past.

Moreover, the central concern of a criminal trial is not the comfort or mental tranquility of others or the insulation of other potential defendants from prejudice. To say that is not to be callous or uncaring. Of course testimony in a case *may* be potentially harmful to others. Of course testimony in a case *may* tend to violate the privacy of others. Of course efforts should be made to mitigate the

unpleasant aspects of courtroom testimony. And of course efforts should be made to protect other potential defendants from prejudice. But the central object of a criminal trial is the execution of the most awesome responsibility the people have reposed in their government: The responsibility to determine whether a citizen should be stripped of virtually every right this nation was founded to protect, including the right to personal liberty or even the right to life. Because of the extraordinary concern of that object, all other concerns must necessarily come second. Given the critical role played by a public trial in the just execution of that central object, the only interest truly compelling enough to warrant closure is an interest in preserving the integrity of the trial itself. To the extent that the interests asserted by the court below have as their focus something else, they cannot provide a proper foundation for closing *any* criminal trial.

Even if one assumes for the moment that each of the interests articulated by the court below was sufficiently compelling to warrant closure over the petitioners' objections, the record in this case clearly demonstrates the dangers of closing a criminal trial based only on a prosecutor's jeremiad without the trial court making a precise and focused determination concerning whether closure is necessary to achieve a relevant interest, whether it represents the least restrictive method for doing so or whether it will be effective. Tested by these criteria, on the present record, none of these interests was sufficient to warrant closure.

The real mischief in this case lies in the fact that the court below simply created a catalogue of horrors which the trial court never envisioned, much less considered. Moreover, this record is devoid of *any* evidence showing

that the interests articulated by the court below were imperiled, or that closure was necessary to protect them.

No information potentially harmful to "others" was revealed; no information which would tend to violate the privacy of "others" was revealed; no information which "might prejudice other potential defendants" was revealed. The catalogue of horrors which the court below spoke of was merely a rhetorical device to quiet petitioners—sheer whimsy to justify a palpably bad decision.

Besides, unless the trial court was prepared to bar access to the courtroom to everyone, including the defendants, what was to prevent the defendants from disclosing whatever transpired in the courtroom? How did closure ameliorate this danger? The fact of the matter is that closure in this case could not assure privacy in any meaningful sense of the term; could not prevent disclosure of information "potentially harmful to others;" and could not prevent disclosure of information which "might prejudice other potential defendants."

Moreover, the record in this case will not permit a reasoned conclusion that the prosecution was concerned with any of these speculative problems. And the record is devoid of *any* evidence that any other prosecutions were at risk because of any evidence elicited during the closure.

Much of what has been said about the first three interests applies, with even greater force, to the fourth, fifth and sixth interests described by the court below, i.e., "to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice." Appendix A-5.

To begin with, it's extremely doubtful, at least in this context, whether "generally to further the administration

of justice," is the kind of interest which is sufficient to overcome an accused's demand for a public trial. The thrust of this Court's opinions in *Globe Newspaper Co.*, *Richmond Newspapers* and *Gannett* would lead to precisely the opposite conclusion, i.e., that the sound and orderly administration of justice is furthered by the "presumption of openness [which] inheres in the very nature of a criminal trial under our system of justice." *Richmond Newspapers*, 448 U.S. at 573. A rule based on a contrary presumption certainly cannot withstand constitutional analysis.

The fourth interest identified by the court below, i.e., "to preserve order and decorum in the courtroom" has traditionally been preserved by the courts without closure, and, in this case, no one was indecorous.

The fifth, i.e., "to protect the rights of parties and witnesses," was never imperiled. Which parties needed protection? Which witnesses needed protection? From whom? From what? Why?

This Court has emphasized the historical importance of openness in assuring "that the proceedings were conducted fairly to all concerned, and [in discouraging] perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Richmond Newspapers*, 448 U.S. at 569. See also *In re Oliver*, 333 U.S. 257, 266-70. That being the case, it is apparent that arbitrary closure must inevitably damage the integrity of the judicial process and thus the justice in which that process results. See generally *Richmond Newspapers*, 448 U.S. at 569-73. To posit a "just" conviction following a secret trial is, in sum, to posit a contradiction in terms.

In summary, several of the interests identified are not the kinds of interests which may justify exclusion of the

public. And even if those interests may sometimes justify partial closure, this record is devoid of any facts showing a clear and direct nexus, or any nexus at all, between these interests and closure here or a showing that some other method would not have worked or even showing that closure would.

Conclusion

There simply is nothing in the record now before this Court which would lead to a reasoned conclusion that a danger to the just progress of the petitioners' trial, or even the interests possessed by anyone else, would have been presented by the attendance of the public.

Given the specific and focused guarantees of the Sixth Amendment, given the principles which underlie these guarantees and given the unbroken course of history during which these principles and guarantees uniformly have been observed, nothing short of the most compelling necessity imaginable should serve to support exclusion of the public from a criminal case. Certainly no prosecutor's mere unsupported request to remove certain portions of certain trials from the public view should warrant closing courtroom doors.

The judgment below should be reversed.

B.

THE STATUTE UNDER ATTACK

The statute under attack delegates to the police officers executing a search unbridled discretion; hence, it not only violates the Fourth Amendment's specificity and particularity requirements, it constitutes an impermissible delegation of the magisterial duty and function of determining, in advance, questions of probable cause and

laying out the permissible scope of the fruit to be gathered. The statute authorizes the officer executing a search to seize any property *he* "has probable cause to believe will be subject to forfeiture and will be lost or destroyed if not seized."

The statute, then, authorizes the executing officer not only to determine probable cause but dispenses with pre-search determination of specificity and particularity. This Court held almost eighty years ago that the warrant must describe the property to be seized with sufficient specificity and particularity, so that nothing is left to the discretion of the executing officer. *Marron v. United States*, 275 U.S. 192, 196. Where the warrant invites discretion, it fails for lack of specificity and is classified as general. See Mascolo, *Specificity Requirements for Warrants Under the Fourth Amendment: Defining the Zone of Privacy*, 73 Dick. L.Rev. 1, 5-6 (1968).

Nor does this statute fit within any well-delineated exception to the rule that searches conducted outside the judicial process without prior approval are *per se* unreasonable under the Fourth Amendment. *Carroll v. United States*, 267 U.S. 132. This statute simply permits general searches. *Morrison v. United States*, 275 U.S. 192. The warrants issued here authorized, generally, a search for gambling-related evidence. Armed with the statute, the executing officers embarked on an unconstitutional orgy of unique proportions. The trial court summed it up pithily: "Well, I'm taking the view that they went in and took everything in sight." (S.T. 638).

And the Georgia Supreme Court acknowledged that the officers seized "all manner of personal items, including jewelry, letters, school report cards, unopened strong boxes and other items which were then sifted at leisure by

the police in a search for evidence." (App. A-3.)*

After sifting through innumerable cardboard boxes loaded with seized items – items which the state conceded were benign, i.e., not crime-related, not of evidentiary value and not subject to forfeiture – in an act of uncommon benevolence (and, incidentally, to propitiate a visibly distressed trial judge (S.T. 634, 635)), the state offered to return the improperly seized items. The trial judge brusquely issued an order finding "that the boxes labeled Defendants' exhibits 250 through 259 contain *documents* which are personal and not crime-related. That speaks for itself." (S.T. 641-42). Alas, the Petitioner argued that because this was a general search everything seized should be suppressed if the exclusionary rule's deterrent principle is to have any practical meaning. Cf. *Kremen v. United States*, 353 U.S. 346. This argument was rejected by the trial court and the Georgia Supreme Court, since "[s]uch items as were unlawfully seized were excluded from evidence at trial pursuant to a motion to suppress." (App. A-3.) *Ergo*, that cured the evil of the general search and thus the admission into evidence of items particularly described in the warrant was ok. (App. A-3.)

This reasoning, however, is flawed. By failing to inform the magistrate of all the material facts, including the purpose of the search and its intended scope, the officers deprived him of the opportunity to exercise meaningful supervision over their conduct and to define the limits of the warrant.

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*The list of things taken is mind-boggling: gas and electric bills, cemetery deeds of ancient vintage, love letters, children's drawings, Christmas, Valentine and Easter cards, wedding portraits, group family photographs, credit reports, bank statements, bounced checks, credit applications and rejections, etc.

The search warrant issued here was not a general warrant on its face. The things to be discovered were described with particularity. The question is whether the search that was conducted, under the auspices of the statute, was not confined to the lawful scope and became general. Had the issuing judge been informed of the true reason for the warrant request and the scope of the search contemplated, he might have ok'd it, subject to explicit limitations on the scope of discovery to prevent an overly intrusive search. But the officers, relying on the statute's sweep, withheld that information, arrogating to themselves the magisterial function of setting out the dimensions of the search.

It is, of course, not the rule that only evidence uncovered during a search must invariably be described in the warrant before it may be seized. Where evidence is uncovered during a search pursuant to a warrant, the threshold question must be whether the search was confined to the warrant's terms. It may not be a general exploratory search. *Gurelski v. United States*, 405 F.2d 253, 258 (5th Cir., 1968). As executed here, the warrant became an instrument for conducting a general search. Under the circumstances, it was not possible to identify after the fact the discrete items of evidence which would have been discovered had the officers kept their search within the bounds permitted by the warrant; and therefore *all* evidence seized during this search under the auspices of this statute should have been suppressed. Accord, *United States v. Rettig*, 589 F.2d 418, 422-423 (9th Cir. 1978).

Throughout the constitutional challenge (e.g., Motion to Suppress and during the hearing on the Motion, S.T. 604-32, General Demurrer, Amended Motion for a New

Trial), it was argued that the word "property" in the statute, when construed to include private papers, presented the additional question of reasonableness. See *Boyd v. United States*, 116 U.S. 616. An examination of the books, papers and personal possessions in a person's home is an especially sensitive matter, calling for careful exercise of the magistrate's judicial supervision and control. See *Stanford v. Texas*, 379 U.S. 476. But, because of the statute's broad sweep, the officers didn't bother disclosing their intention; they simply arrogated to themselves the power to take whatever they wanted.

Conclusion

Even granting the enfeebled state of the Fourth Amendment, O.C.G.A. §16-14-7(f) (formerly Ga. Code Ann. §26-3405(d)(2) can't pass constitutional muster.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James K. O'Malley, one of Petitioner's attorneys of record, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the Rules of the Supreme Court, I have this day served three true and correct copies of this Petition for Writ of Certiorari upon Respondent, by depositing three copies of this Petition in the United States Mail, with adequate postage and addressed to:

MICHAEL J. BOWERS
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132 State Judicial Bldg.
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Atlanta, Georgia 30334

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This 25th day of August, 1983.

James K. O'Malley

JAMES K. O'MALLEY
Attorney for Petitioner

APPENDICES

APPENDIX A

In the Supreme Court of Georgia

Decided: June 1, 1983

39385. GUY WALLER ET AL. v. THE STATE.

CLARKE, Justice.

Appellants and others were indicted and charged with violation of the Georgia Racketeer Influenced and Corrupt Organizations Act (OCGA § 16-14-1, et seq.) and convicted of the offenses of commercial gambling and communicating gambling information. This appeal does not concern the sufficiency of the evidence except in regard to the question of venue.

The evidence at trial showed that appellants participated, with hundreds of others on a lower level, in a lottery ring which involved gambling on the volume of stocks and bonds traded on the New York Stock Exchange. The information was transmitted by telephone and telecopier and stored in a microcomputer maintained by appellant Cole.

(1) The basis of this court's jurisdiction is that appellant has made a facial attack on OCGA § 16-14-7(f) of the forfeiture provision of the Georgia Racketeer Influenced and Corrupt Organizations Act (hereinafter RICO). The State argues that jurisdiction is not in this court because the constitutional challenge was not properly raised in the trial court and because appellants have no standing to raise the constitutionality of the forfeiture procedure since the evidence presented at trial was seized pursuant to search warrants. We find that the constitutional issue was properly raised at trial and that appellants have standing to raise it on appeal.

Appellants contend that the statute is unconstitutional because it authorizes seizure of "[a]ll property of every kind used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity" prior to filing a complaint for a RICO in rem forfeiture proceeding and prior to the obtaining of a writ of seizure. Appellants insist that this statute is on its face violative of the Fourth Amendment to the United States Constitution.

We find that the provision in question, OCGA § 16-14-7 (f) is constitutional on its face. A seizure under this section is allowed only in carefully prescribed circumstances. The seizure must be incident to a lawful arrest, search or inspection, and the officer must have probable cause to believe that the property is subject to forfeiture or that the property will be lost or destroyed if not seized. There is no Fourth Amendment problem with the seizure or the fruits of a lawful search or inspection. The statute on its face provides that the search or inspection must be lawful. This requires that the search be pursuant to a warrant, incident to a lawful arrest, or in the presence of other exigent circumstances, which would render the search or inspection "lawful." By definition, therefore, the statute complies with the Fourth Amendment. For a discussion of exigent circumstances, see New York v. Belton, 453 U.S. 454 (101 SC 2860, 69 LE2d 768) (1981); Chimel v. California, 395 U.S. 752 (89 SC 2034, 23 LE2d 685) (1969); Warden v. Hayden, 387 U.S. 294 (87 SC 1642, 18 LE2d 782) (1967).

Seizure of contraband, evidence, or weapons not listed on a search warrant by an officer executing an arrest warrant or search warrant does not violate the due process clause of the Fourteenth Amendment even though there

has been no notice and hearing. Calero-Toledo v. Person Yacht Leasing Co., 416 U.S. 663 (94 SC 2080, 40 LE2d 452) (1974). See also Fuentes v. Shevin, 407 U.S. 67 (92 SC 1983, 32 LE2d 556) (1972).

(2) The next question before us is whether the statute was applied in an unconstitutional manner as to appellants. According to appellants, officers acting under search warrants went far beyond the scope of the warrants in conducting general searches and seizing all manner of personal items including jewelry, letters, school report cards, unopened strong boxes and other items which were then sifted at leisure by the police in a search for evidence. Such items as were unlawfully seized were excluded from evidence at trial pursuant to a motion to suppress. It is appellant's contention that because certain property seized was outside the warrant, all of the evidence should have been suppressed. Appellants rely on Marron v. United States, 275 U.S. 192 (48 SC 74, 72 LE2d 231) (1927), United States v. LaVallee, 391 F.2d 123 (2d Cir. 1968), and United States v. Pinero, 329 F.Supp. 992 (S.D. N.Y. 1971), in support of their position. In Marron v. United States, the Court held that under the Fourth Amendment a search warrant describing intoxicating liquors and articles for their manufacture did not authorize seizure of a ledger and bills of accounts. However, finding that the ledger and bills were seized incident to a lawful arrest, the Court affirmed the appellant's conviction. In United States v. LaVallee and United States v. Pinero, the warrant did not describe the items at issue. Since the search was not conducted under any exception to the warrant requirement of the Fourth Amendment, the items not described in the warrant were suppressed. These cases stand for the rule that evidence improperly seized is inadmissible. There is no requirement that where

evidence has been lawfully seized it must be suppressed if officers unlawfully seized other material, unless the unlawfully seized evidence led to the discovery of the evidence which was admitted.

(3) Appellants contend that their convictions should be overturned because the term of court at which they should have been tried under their demands for a speedy trial had expired. OCGA § 17-7-170(b) (formerly Code Ann. § 27-1901) provides: "If the person is not tried when the demand is made or at the next succeeding regular court term thereafter, provided at both court terms there were juries impaneled and qualified to try him, he shall be absolutely discharged and acquitted of the offense charged in the indictment or accusation." For demand to cause the time to begin to run there must be a jury impaneled and qualified to try the defendant. *DeKrasner v. State*, 54 Ga.App. 41 (187 SE 402) (1936). Here the trial court found that there was no jury impaneled to try the case during the term in which appellants filed their demands. Consequently, the time allowed by the two-term trial requirement did not begin to run until the term following that during which the demand was filed. In the absence of clear and convincing evidence to the contrary, we will not disturb the trial court's finding that no jury qualified to try appellants was impaneled during the term in which the demand was filed. *Wilson v. State*, 156 Ga.App. 53 (274 SE2d 95) (1980). See also, *State v. McDonald*, 242 Ga. 487 (249 SE2d 212) (1978).

(4) In their next enumeration of error appellants complain that the trial court erred in ordering the courtroom closed during the hearing on the motion to suppress. Appellants insist that this constitutes a violation of their rights under our holding in *R. W. Page Corp. v. Lumpkin*,

249 Ga. 576 (292 SE2d 815) (1982). In the hearing here, information was revealed which was potentially harmful to others, would tend to violate the privacy of others, and might prejudice other potential defendants. Under these circumstances, the court balanced appellants' rights to a public hearing on the motion against the privacy rights of others and closed the hearing. The court exercised its inherent power ". . . to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice." *Lowe v. State*, 141 Ga.App. 433, 435 (233 SE2d 807) (1977). We find that appellants' Sixth Amendment right to a public trial was not violated. There is some question whether state or federal law would have required that the wiretap information be revealed only in a closed courtroom. OCGA § 16-11-64(8); 18 U.S.C.A. § 2517. We need not reach this question since the thrust of appellants' argument is that the court failed to follow the procedure announced in *R. W. Page Corp. v. Lumpkin*, supra. This argument has no merit since the hearing in question occurred before that case was decided and before the procedural requirements set forth took effect.

(5) Appellants allege error in the admission of evidence gathered by electronic surveillance in counties other than Fulton County pursuant to warrants obtained in Fulton County and in the court's denial of appellants' motion to amend their motion to suppress to reflect facts in support of this allegation. Since we find that the amended motion to suppress was not timely made, we need not address the question whether the evidence should have been admitted. OCGA § 17-5-30 (former Code Ann. § 27-313) provides that a motion to suppress the fruits of an unlawful search and seizure shall be in writing and state facts showing that the search and seizure was unlawful. Although there

is no time limit set out in the statute for the filing of a motion to suppress, the statute has been interpreted as requiring that the motion be made before the issue is joined. *Perryman v. State*, 149 Ga.App. 54 (253 SE2d 444) (1979); *State v. Shead*, 160 Ga.App. 260 (286 SE2d 767) (1981). We interpret this to mean before the defendant enters his written plea. Although not controlling here, the federal wiretap statute provides that a motion to suppress the fruits of an illegal wiretap be made ". . . before the trial, hearing or proceeding unless there as no opportunity to make such motion or the person was not aware of the grounds of the motion." 18 U.S.C.A. § 2518 (10)(a).

In the present case the trial judge, after hearing, specifically found that the amended motion was made after issue was formally joined and without any showing of good cause. We find no error in the court's refusal to grant the motion to amend.

(6) Appellants assert that certain evidence which the state discovered through electronic surveillance pursuant to OCGA § 16-11-64 should not have been admitted in evidence because it had been disclosed to the Federal Bureau of Investigation, the Georgia Bureau of Investigation, the Organized Crime Prevention Council and the Internal Revenue Service. In support of this position, appellants point to OCGA § 16-11-64(b)(8), which limits the state's right to publish information obtained under an electronic surveillance warrant "other than that necessary and essential to the preparation of and actual prosecution for the crime specified in the warrant . . . ." The section then mandates that should a prohibited publication occur, the published information may not be admitted into evidence.

The state counters with the argument that no violation occurred here because federal law authorizes this type information be disclosed to other investigative or law enforcement officers to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure. 18 U.S.C. 2517(1). The state also cites *Morrow v. State*, 147 Ga.App. 395 (249 SE2d 110) (1978), cert. den. 440 U.S. 917 (1979), and *Cox v. State*, 152 Ga.App. 453 (263 SE2d 238) (1979). In these cases the Court of Appeals held that the disclosure of such information to other law enforcement officers does not cause the information and evidence to be inadmissible.

In the case before us, the disclosure of the information was specifically authorized by a court order which cited both the state and federal statutes and listed the agencies to whom the disclosure could be made. The import of the order is that the superior court judge entering the order concluded that the sharing of information between law enforcement agencies was in fact necessary and essential to the preparation and actual prosecution for the crime specified in the warrant. In view of the fact that this prosecution is for violations of the statute aimed at organized crime, it is reasonable to find that organized efforts of law enforcement agencies are essential and necessary. This finding is supported by the clear language of OCGA § 16-14-2(b), which sets forth the intent of the General Assembly in enacting the RICO statute, to impose sanctions against "an interrelated pattern of criminal activity, the motive or effect of which is to derive pecuniary gain." Our interpretation of the General Assembly's intent to foster cooperation between law enforcement agencies as necessary to the prosecution of organized crime is further borne out by a recent amendment to the RICO statute

authorizing reciprocal agreements with the chief prosecutors of any jurisdictions having substantially similar statutes. OCGA § 16-14-10(b), Ga.L. 1982, p. 1385, § 12.

(7) Appellants' seventh, eighth, ninth and tenth enumerations of error deal with appellants' claim that the state used straw "co-defendants" as informants at trial in spite of appellants' written demand before arraignment that the state disclose such information. The conversations between investigative officers and the informants were recorded and reviewed by the trial judge, who found that the tapes corroborated the testimony of the officers that no defense tactics were revealed and that no prosecutorial misconduct occurred. As the state points out, the only relief sought by appellants was disclosure of the informants. At the time of the hearing on the motion to suppress, the state indicated that the names of the informants had been disclosed and that the informants had been shown no special treatment. While we share the trial court's concern that the police tactics used here could lead to abuse, we find no error in his conclusion that no abuse of appellants' rights occurred in this case.

(8) Appellants complain that sworn oral testimony outside the affidavit was considered by the magistrate who authorized the wiretap. There is no merit to this enumeration since the magistrate issuing the search warrant may consider sworn oral evidence outside the affidavit to establish probable cause. *Simmons v. State*, 233 Ga. 429 (211 SE2d 725) (1975); *Cox v. State*, 152 Ga. App. 453 (263 SE2d 238) (1979). See also 18 U.S.C.A. § 2518(2). We decline counsel's invitation, as did the Court of Appeals in *Cox*, supra, to adopt Rule 4(c), F.R.Cr.P. which requires recordation of sworn oral testimony.

(9) The contention that the court erred in limiting

cross-examination of witnesses in the hearing in the motion to suppress is without merit. As the United States Supreme Court noted in Aquilar v. Texas, 378 U.S. 108, 109, n.1 (84 SC 1509, 12 LE2d 723) (1964). "It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention." Although appellants also complain that the affiant was allowed to testify to the facts not in the affidavit, in fact, the record shows that affiants' testimony was limited to information presented to the magistrate.

(10) The trial court did not err in finding probable cause for the magistrate to issue the warrants despite certain mistakes of fact in the affidavit. There being sufficient information to support a finding of probable cause even discounting the mistaken information, the court did not err in finding that the affidavit was sufficient. Franks v. Delaware, 438 U.S. 154 (98 SC 2674, 57 LE2d 667) (1978).

(11) Following a recess in the suppression hearing a witness stated that before proceeding with his testimony he needed to clarify testimony given earlier. He stated that the review of his investigative report and his affidavit during the recess "cleared my mind." Defense counsel asked if the report were available, and the witness replied that it was not, that it was in the possession of the district attorney. Defense counsel moved for production of the report, and the court denied the motion. Appellants argue that they were entitled to see the investigative report from which the witness refreshed his recollection.

The rule in Georgia is that even had the witness had the report before him on the stand, the defendant could

not have procured the report as a matter of right simply by virtue of the fact that the witness used it to refresh his recollection. *Williams v. State*, 250 Ga. 664 (____ SE2d ____) (1983). "The defendant had no right to examine the witness' report which was used to refresh his memory and which was not in evidence." Id. at 665. See also *Jackson v. State*, 242 Ga. 692 (251 SE2d 282) (1978). It is true that this rule has been criticized as interferring with defendant's right to a thorough and sifting cross-examination. See dissent of Hill, C.J., *Williams v. State*, supra. However, in the present case, where the witness refreshes his recollection prior to taking the stand and has no notes in his possession, there can be no question that the state is under no greater compulsion to produce the report than if the witness had reviewed it before the trial began. In order for this report to be discoverable there must have been some reason other than the fact that it was reviewed by the witness.

(12) The enumeration of error regarding venue is deemed abandoned. Rules of the Supreme Court of the State of Georgia, Rule 45.

Judgment affirmed. All the Justices concur, except Hill, C.J., and Smith, J., dissent to division 3, Smith, J., dissents to division 5, Smith, J., and Weltner, J., dissent to division 6, Hill, C.J., and Smith, J., dissent to division 11. Gregory, J., concurs in the judgment and concurs specially in division 11.

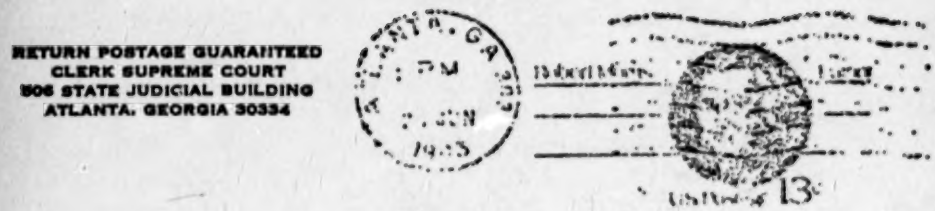
In the Supreme Court of Georgia

39385. WALLER, et al v. THE STATE

GREGORY, J., concurring specially.

I concur in the judgment in this case and specially in division 11. Where a witness on the witness stand uses a writing or any other thing to refresh his recollection, it ought to be subject to examination by opposing counsel. See Chief Justice Hill's dissenting opinion in *Williams v. State*, 250 Ga. 664, 668 (1983). However, where the writing or other thing is not available in the courtroom access by counsel must depend upon the rules of discocvery.

APPENDIX B



Herbert Shafer
ATTORNEY AT LAW
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Atlanta, GEORGIA
30305

Clerk's Office, Supreme Court of Georgia

ATLANTA 6/28/83

The motion for a rehearing was denied today:

Case No. 39385, Waller et al. v. The State

Hill, C.J., Smith & Weltner, JJ., dissent.

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

In the Supreme Court of Georgia

39385. WALLER v. THE STATE

HILL, Chief Justice, dissenting.

I dissent to division three (3) of the majority opinion. See *The State v. McDonald*, 242 Ga. 487, 489 (SE2d) (1978) (Hill, J. dissenting).

I also dissent to division eleven (11). See *Williams v. The State*, 250 Ga. 664, 668 (SE2d) (1983) (Hill, C.J., dissenting). There a minority of this court concluded that " . . . where a state's witness utilizes a report or other writing to refresh the witness' recollection, denying defense counsel the right to examine such writing constitutes a denial of the right of cross-examination." In my view, it makes no difference whether the witness uses the report to refresh his or her recollection while on the witness stand, or during a recess in the trial. The result is the same; the opposing party has been denied the right to a thorough and sifting cross-examination. This is particularly true where the district attorney shows the report to the witness, and the witness, with recollection thus refreshed, purports to "clarify" testimony given before the recess. The reference by the witness to the writing lends credibility to the "clarification", which opposing counsel is denied the opportunity to refute by reference to the writing. I therefore dissent.

I am authorized to state that Justice Smith joins this dissent.

APPENDIX C

TRANSCRIPT EXCERPTS OF CLOSURE COLLOQUY

MR. MOYE: Yes, Your Honor. The third matter, Your Honor, is a motion that the State has filed, filed on the 14th of June to close the courtroom to these proceedings. . . .

MR. MOYE: I do not ask that the trial be closed Your Honor. I seek only during the Motion to Suppress Hearing that the Hearing be closed.

THE COURT: Do you wish to be heard?

MR. SHAFER: Yes, Your Honor. Mr. Moye says that the purpose of this is to avoid any unnecessary publication. Well, there's been publication galore.

THE COURT: Now there might have been. But I can't make that judgment at this time.

MR. SHAFER: Well, in view of the unnecessary publication that has already been made and in view of my clients' constitutional rights to an open trial, we will not only not join in the Motion, we oppose it vehemently and we insist on our constitutional right to an open trial.

THE COURT: Insofar as the Motion is concerned?

MR. SHAFER: As far as every second of this trial.

THE COURT: Including the Motion?

MR. SHAFER: Including the Motion, yes, Sir.

THE COURT: All right.

MR. MOYE: Your Honor, as I understand the law, the right to a public trial is not unfettered, that it is in some respects within the discretion of the Court. Of course, this Court can close a courtroom to protect a witness as

this Court has done. This Court has much discretion on the matter.

THE COURT: All right, Sir I'm gonna grant your motion, but I want it understood now when we reach, if we do reach the trial of the case in chief, you have got an entirely different situation if you reach that point.

MR. MOYE: If we reach that point Your Honor, I would have to make a new motion. This covers only the motion hearing right now.

MR. SHAFER: Do I understand the Court is going to close these doors and deprive my client of public trial?

THE COURT: Yes, Sir, on the motion.

MR. SHAFER: Respectfully except. . . .

MR. SHAFER: I want to make a record, Your Honor. I have here several people who are vitally important to me, since I have no law clerk, who need to be at my beck and call so that I can have them run errands, so I can give them instructions to make telepone calls, obtain witnesses for me and to do any and all of the myrid of (sic) things that an attorney needs to do in order to effectively render assistance of counsel. One of them is my secretary and my wife. Another one is Mr. Evans and that is all at the moment. And I respectfully ask that they be permitted to stay.

MR. MOYE: I have no objection Your Honor, to Mr. Shafer's wife and secretary remaining. I do as to Mr. Evans. He is a part to a different set of proceedings, not to these proceedings at this time.

THE COURT: Is he a witness?

MR. MOYE: He's not a witness, he's not a party, he's not a lawyer.

THE COURT: What is his function? He's not an officer of the Court.

MR. SHAFER: No, he's not an officer of the Court. He's working for me. He's going to run errands for me.

APPENDIX D

[Filed in Office, June 14, 1982, Martha Nolan, Deputy Clerk, Superior Court, Fulton County, Georgia]

IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

THE STATE OF GEORGIA, *Plaintiff* vs. WALTER LEE EVANS, et. al., *Defendants*	INDICTMENT NO. A-59256

MOTION

Now comes THE STATE OF GEORGIA by the District Attorney for the Atlanta Judicial Circuit and files the within Motion and respectfully shows the court as follows:

1.

During the trial of the above-styled case, The State anticipates utilizing evidence derived from court-authorized electronic surveillance.

2.

Motions to suppress said evidence have been filed in the above-styled case and will be heard prior to or during the trial of same.

3.

During the hearing on the motions to suppress, The State, in order to validate the seizure of the evidence, must utilize evidence which may involve a reasonable expectation of privacy of persons other than those indicted in the above-styled case.

WHEREFORE, The State respectfully prays that any hearing on any motions to suppress evidence secured as a result of electronic surveillance, whether heard prior to or during the trial of the within case, in which evidence must be presented by The State, be closed to the public.

Respectfully submitted,

LEWIS R. SLATON
District Attorney
Atlanta Judicial Circuit

By: H. ALLEN MOYE
H. ALLEN MOYE
Assistant District Attorney

BENJAMIN H. OEHLERT, III
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Assistant District Attorney

Attorneys for Plaintiff

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Nos. 83-321 & 83-322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GUY WALLER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

CLARENCE COLE, *et al.*,

Petitioners,

v.

STATE OF GEORGIA,

Respondent.

On Writs of Certiorari to the Supreme Court of the State of Georgia

JOINT APPENDIX

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Counsel for Petitioners

TABLE OF CONTENTS

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION:

AMENDMENT I

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to have the Assistance of Counsel for his defense.

AMENDMENT XIV

Section 1 . . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

OFFICIAL GEORGIA CODE ANNOTATED:

SECTION 16-11-64(b)(8)

Any publication of the information or evidence obtained under a warrant issued hereunder other than that necessary and essential to the preparation of and actual prosecution for the crime specified in the warrant shall be an unlawful invasion of privacy under this Chapter, and shall cause such evidence and information to be inadmissible in any criminal prosecution.

SECTION 16-14-7(a)

All property of every kind used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity is subject to forfeiture to the state.

SECTION 16-14-7(f)

Seizure may be effected by a law enforcement officer authorized to enforce the penal laws of this state prior to the filing of the complaint and without a writ of seizure if the seizure is incident to a lawful arrest, search, or inspection and the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if not seized. Within ten days of the date of seizure, the seizure shall be reported by the officer to the district attorney of the circuit in which the seizure is effected; and the district attorney shall, within 30 days of receiving notice of seizure, file a complaint for forfeiture. The complaint shall state, in addition to the information required in subsection (e) of this Code section, the date and place of seizure.

RELEVANT DOCKET ENTRIES

Return of Indictment by Fulton County Grand Jury	Feb. 9, 1982
State's Motion to Close Hearing on Motions to Suppress Filed	June 14, 1982
Jury Empanelled and Excused for Duration of Suppression Hearing	June 21, 1982
Defendants' Motions to Suppress Filed	June 21, 1982
Suppression Hearing Commenced and Closure Order Entered	June 21, 1982
Motions to Suppress Partially Overruled	June 29, 1982
Trial-in-Chief Commenced	June 30, 1982
Jury Verdicts Returned	July 14, 1982
Sentences Imposed	July 14, 1982
Notice of Appeal Filed	Oct. 15, 1982
Decision of Georgia Supreme Court	June 1, 1983
Petition for Rehearing Denied	June 28, 1983
Petitions for Certiorari Filed	Aug. 26, 1983
Certiorari Granted	Nov. 7, 1983

WARRANT FOR SEARCH AND SEIZURE RESPECTING PETITIONER COLE (APPROVED JAN. 11, 1982)

STATE OF GEORGIA

County of Cobb

Affidavit and oral testimony having been given before me by Lt. F. L. Townley, Atlanta Bureau of Police Services, acting in his official capacity as an officer authorized to enforce the criminal laws of Georgia, that he has probable cause to believe that on the person of Clarence Cole and on the premises known as 2401 Roberts Drive, #3, Smyrna, in Cobb County, Georgia, and in adjacent buildings and vehicles on said premises and within the curtilage thereof, and in the possession and under the control of the aforesaid persons, there is now being concealed certain property, to wit: money; betting slips; lottery ribbons; lists of bettors; documents containing information related to gambling; computers and other information storage and retrieval devices; telecopiers and other facsimile reproduction devices; telephones and other related communication devices; radio frequency scanners and other radio communication devices, which things are subject to search and seizure as tangible evidence of the crimes of commercial gambling, communicating gambling information and keeping a gambling place, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person, premises and vehicles above described, and that the grounds for issuance of the search warrant are true; you are hereby commanded to search forthwith the person, premises and vehicles above described for the property specified, and to make the search at any time in the day or night, in so doing you are authorized to search any persons found in said premises or vehicle or who enter the same during the execution of this warrant, and if the property be found there to seize it, leaving a copy of this warrant and under oath to return this warrant, filing therewith under oath a written inventory of the property seized and to bring the property all before me or any court of competent jurisdiction without unnecessary delay and within ten (10) days of this date, as required by law.

Because evidence of the types sought and authorized herein to be seized, and the likelihood of its destruction, if notice of the search is given, the officers executing this warrant are hereby authorized to enter the aforesaid premises without giving the notice otherwise required by *Georgia Code Ann.* Sec. 27-308.

The officers executing this warrant shall have the authority to search other persons found in the premises to the extent authorized by *Georgia Code Ann.* Sec. 27-309, and, if those persons are named in the affidavit executed before this Court, or any of its attachments, the officers are authorized to search those persons as if they had been specifically named therein.

This 11th day of January, 1982, at 2:00 o'clock P.M.

/s/ DOROTHY A. ROBINSON

Judge, Superior Court, Cobb
Judicial Circuit

STATE'S MOTION TO CLOSE HEARING ON MOTIONS TO SUPPRESS (FILED JUNE 14, 1982)

[CAPTION OMITTED]

MOTION

Now comes THE STATE OF GEORGIA by the District Attorney for the Atlanta Judicial Circuit and files the within Motion and respectfully shows the court as follows:

1.

During the trial of the above-styled case, The State anticipates utilizing evidence derived from court-authorized electronic surveillance.

2.

Motions to suppress said evidence have been filed in the above-styled case and will be heard prior to or during the trial of same.

3.

During the hearing on the motions to suppress, The State, in order to validate the seizure of the evidence, must utilize evidence which may involve a reasonable expectation of privacy of persons other than those indicted in the above-styled case.

WHEREFORE, The State respectfully prays that any hearing on any motions to suppress evidence secured as a result of electronic surveillance, whether heard prior to or during the trial of the within case, in which evidence must be presented by The State, be closed to the public.

Respectfully submitted,

LEWIS R. SLATON
District Attorney
Atlanta Judicial Circuit

By: /s/ H. ALLEN MOYE

H. Allen Moye
Assistant District Attorney

/s/ BENJAMIN H. OEHLERT, III

Benjamin H. Oehlert, III
Assistant District Attorney

Attorneys for Plaintiff

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DEFENDANTS' MOTION TO SUPPRESS (FILED JUNE 21, 1982)

[CAPTION OMITTED]

MOTION TO SUPPRESS[*]

COME NOW the Defendants above-named, prior to trial, and move this Court to suppress the use of any intercepted wire or oral communications of the Defendants, or of any evidence discovered, learned, traced or in any manner derived therefrom, including the identity or testimony of any witnesses discovered as a result thereof, and any physical evidence seized during the execution of any search warrants issued subsequent to the interception of Defendants' conversations and/or flowing therefrom, in whole or in part; and for a further Order directing the return of all recordings and transcriptions of such interceptions, including copies; for an Order directing the return of any physical evidence seized as aforesaid; and for an Order proscribing the use of all such evidence, directly or indirectly, in any trial, hearing or other proceeding (except insofar as such evidence may be required in furtherance of this Motion) on the grounds that:

(1) The underlying affidavits submitted in support of the applications for the wiretaps conducted herein, and which are the object of this Motion, failed to allege sufficient facts which would authorize the issuing judges to conclude that there was probable cause to believe that any of the above-named Defendants were engaged in the criminal activity for which the Orders of authorization were sought.

(2) The applications failed to describe with particularity those whose conversations were to be intercepted, especially the above-named Defendants.

---

* Motion of Guy Waller, Hudson Ashley, Sandra E. Ashley, Eula Burke, W.B. Burke, and Archie Thompson. The suppression motion filed by petitioner Cole was virtually identical. See p. 12a, below.

(3) The issuing judges did not satisfy themselves that the applicant for the warrant was himself aware of facts and circumstances of his own knowledge which were sufficient to lead a man of reasonable caution to believe that the above-named Defendants were engaged in committing the crime for which the Orders of authorization were sought.

(4) The issuing judges failed to satisfy themselves that there existed exigent circumstances which required issuance of Orders of authorization to conduct electronic surveillance.

In point of fact, as is routinely done in Fulton County, the issuing judges simply rubber-stamped the applications.

(5) The officers executing the warrants failed to make a meaningful return of the warrant to the issuing judges, setting forth with particularity and specificity how such warrants were used and employed and what was obtained thereby.

In point of fact, except for some superficial litany routinely set out in the returns, the issuing judges were not in any meaningful way made aware of what was discovered during the antecedent tap so that they might intelligently discharge their magisterial discretion as to the need, *vel non,* of any more electronic surveillance.

(6) Indeed, as is routinely done in Fulton County, the applicant resorted to the bootstrap phenomenon of one tap begetting another in the guise of probable cause, all with the compliant issuing judges' blessings.

(7) The issuing judges failed to discharge their solemn duty to supervise the tap during its execution, leaving to the unfettered discretion of the officers conducting the tap the decision as to how long to tap and what to seize.

(8) The issuing judges completely abnegated their duty and responsibility of apprising themselves as to whether the tap was being conducted properly, whether

the tap had achieved its objective, whether the minimization requirements of the statute and the constitution were being complied with.

(9) The complete failure of the issuing judges to oversee the taps resulted in a general search, indiscriminate and pervasive.

(10) None of the returns reflected that the electronic surveillance was terminated immediately upon the interception of the conversations or activities which were authorized to be overheard.

In point of fact, all of the taps were conducted for the full period authorized in the Order, without regard to whether the authorized objective had been attained. This, too, is routinely done in Fulton County.

(11) Information gathered during the taps and evidence derived therefrom were disclosed and published for an impermissible purpose without authorization from the issuing judges.

This, too, is routinely done in Fulton County.

(12) Evidence of crimes other than those authorized in the Orders of authorization was disclosed and published without prior judicial authorization.

(13) The evidence gathered during and after the taps was published and otherwise used in a manner not authorized by federal and state wiretap law.

This, too, is routinely done in Fulton County.

(14) The underlying affidavits submitted in support of the wiretap applications advertently failed to disclose to the issuing judges that the State already possessed sufficient evidence of the violation, by the targets of the applications, of the crimes under investigation, thereby violating the statutory and constitutional requirement that electronic surveillance not be resorted to absent exigent circumstances.

(15) The State did not disclose to the issuing judges the identity of those whose conversations had been intercepted.

(16) The allegations bearing on other investigative techniques were false, boiler-plate litany routinely used by the affiants in Fulton County, and were designed to deceive the issuing judges.

(17) The applications failed to identify all those whom the applicant knew to be using the facilities in question in the commission of the offenses under investigation.

(18) The authorizations issued subsequent to June 24, 1981 were spawned by evidence gathered in the June 24th authorization, which was facially deficient in its inception, in its execution and in the post-tap failure to make and file a sufficient return.

(19) None of the Orders of authorization required the officers conducting the tap to file with the issuing judges periodic reports showing what progress had been made toward achievement of the authorized objective and the need, if any, for continued surveillance.

In point of fact, all the Orders of authorization permitted the monitoring officials to conduct a general search without any judicial oversight.

(20) The interceptions were not made in conformity with the Orders of authorization in that all conversations were intercepted and recorded irrespective of whether they related to authorized objectives.

(21) The first application was based on false, stale and conclusory allegations.

(22) The physical searches and seizures conducted herein were exploratory and general and eventuated in

indiscriminate seizures of property not authorized to be seized, including the private papers of the Defendants.[1]

(23) Searches conducted under the authority § 26-3405(d)(2), Ga. Code[2] are violative of the Fourth and Fourteenth Amendments to the United States Constitution in that it authorizes unbridled seizures by the officers conducting the search without the interposition of judicial control or restraint.[3]

WHEREFORE, the Defendants respectfully pray that the relief prayed for herein be granted and that a hearing be held to divulge the facts herein.

Respectfully submitted,

/s/ HERBERT SHAFER

Herbert Shafer
Attorney for Defendants

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(404) 266-8827

[1] Petitioner Cole specifically objected that "the search warrants were illegally executed in that the seizures were general and exploratory in that the executing officers illegally seized personal letters, bank books, personal papers, business papers, deeds to property, bills of sale to personal property, and numerous other items of evidence not permitted under the search warrants or under the laws of Georgia." Motion of Clarence Cole ¶ 26.

[2] Subsequently recodified as § 16-14-7(f).

[3] Petitioner Cole's motion asserted that O.C.G.A. § 16-14-7(f), in "permit[ing] law enforcement officers to make seizures of items and property without a writ of seizure, is unconstitutional and in violation of the rights of these defendants as protected by the Fourth and Fourteenth Amendments to the Constitution of the United States, in that it fails to impose any judicial restraints upon the law enforcement officers making the seizure and attempts to permit an unbridled seizure of the private property and private papers of citizens of Georgia." Motion of Clarence Cole ¶ 26.

TRANSCRIPT OF JUNE 21, 1982, HEARING ON STATE'S CLOSURE MOTION, FROM SUPPRESSION HEARING TRANSCRIPT, VOL. I, PP. 6-15

[p. 6] MR. MOYE: Yes, Your Honor. The third matter, Your Honor, is a motion that the state has filed, filed on the 14th of June to close the [p. 7] courtroom to these proceedings. This case is going to involve evidence of a most sensitive nature. The motion to suppress is going to of necessity involve the introduction of some evidence that will affect persons other than those presently on trial. Under Georgia Code Annotated Section 26-3004(k),[*] state has an obligation to prevent unnecessary publication involving persons who are not presently on trial in order that the evidence that is presently, that is going to be introduced might subsequently be introduced against these persons. I fear if I introduce this evidence, as I must in order to carry my burden during the motion to suppress, and if the courtroom is open, Your Honor, and publication is allowed to persons other than parties to this action and these proceedings, that the publication would taint the evidence and would preclude its subsequent use. There are some, this evidence will involve some who are indicted but are not on trial now, this evidence will involve some who are not indicted and if it is published in open court in the presence of persons not parties to this trial, it may very well be tainted. I cite as my authority, Your Honor, a case I'm sure Mr. Shafer is well familiar with and that is *Cox* versus *State,* 152 Georgia Appeals, involves, it [p. 8] was at headnote 3, where during the motion to suppress, Mr. Shafer himself made a motion to clear the courtroom of persons other than those parties to the proceeding and the Court of Appeals affirmed Judge Wofford's closing of the courtroom for the purpose of the motion to suppress itself.

THE COURT: Well, let me say this to you. That I have had experience with this wire tap statute on previous occasions. I'm fairly familiar with it, hopefully. It is a right tight statute. It is a right tight statute and it is true that if there is any

* Subsequently recodified as § 16-11-64(b)(8).

publication, it does taint relating to any other alleged offenders. Isn't any question about that. I think you will find in the case of *State* versus *Orkin* where there was a rather strong dissenting opinion respecting majority on this issue, quite candidly I though the dissent was right under those circumstances. But in any event, that is the law. If you plan to offer evidence, or if you are going to offer evidence that relates not only to those defendants not on trial but to other offenders, including I assume those that were involved in my granting of the motion for continuance the other day, that in my judgment insofar as they are concerned, it would amount to a publication and it would be tainted [p. 9] because of the publication. Now it is true insofar as offenders are concerned, that the defendants now on trial, if they were the only ones involved, the fact that you have been declared on trial and engaged in trial, that the law is pretty broad in that regard because it says any preparation and that would include any motions, what not, which would not taint insofar as they are concerned. Would not be tainted. The hearing on the motion wouldn't taint the trial in chief in the event the court overrules the motion. Under those circumstances. But I think it would taint respecting the others. Do you wish to be heard, Gentlemen?

MR. SMITH: If Your Honor please, I agree with the observation made by the State and I concur in Mr. Moye's request, particularly insofar as the hearing of the motions are concerned.

THE COURT: Well that is what I'm talking about, just the motions.

MR. SMITH: Now when it comes to the trial before the jury—

THE COURT: Now wait a minute. When it comes to the main trial, Mr. Moye, you're gonna run into a different situation.

MR. SMITH: I concur so far as the motion is [p. 10] concerned. I strenuously object to closing the courtroom. We insist on a public trial.

THE COURT: You're gonna run into a different situation then. The motion is one thing but when you get to the trial of the case in chief, I can't help what the rulings might be, the right to an open trial is paramount.

MR. MOYE: Your Honor, I well understand that. I think that the statute is sufficient to cover me in that regard. What I deem necessary to play during the trial of the case I don't think is unnecessary publication under the statute. But insofar as the motion—

THE COURT: Well, I agree with you totally on that. I think the motion is one thing but the trial in the case in chief is entirely different. In other words if I had to make a judgment between the right of an open trial and the question that the state now presents respecting the matter being tainted by reason of publication growing out of the trial of the case in chief before the jury, irrespective of the consequences, I would have to rule that the right of open trial is paramount.

MR. MOYE: I do not ask that the trial be closed Your Honor. I seek only during the motion to [p. 11] suppress hearing that the hearing be closed.

THE COURT: Do you wish to be heard?

MR. SHAFER: Yes, Your Honor. Mr. Moye says that the purpose of this is to avoid any unnecessary publication. Well there's been publication galore.

THE COURT: Now there might have been. But I can't make that judgment at this time.

MR. SHAFER: Well, in view of the unnecessary publication that has already been made and in view of my clients' constitutional rights to an open trial, we will not only not join in the motion, we oppose it vehemently and we insist on our constitutional right to an open trial.

THE COURT: Insofar as the motion is concerned?

MR. SHAFER: As far as every second of this trial.

THE COURT: Including the motion?

MR. SHAFER: Including the motion, yes, Sir.

THE COURT: All right.

MR. MOYE: Your Honor, as I understand the law, the right to a public trial is not unfettered, that it is in some respects within the discretion of the court. Of course, this court can close a courtroom to protect a witness as this court has done. [p. 12] This court has much discretion on the matter.

THE COURT: All right, Sir I'm gonna grant your motion, but I want it understood now when we reach, if we do reach the trial of the case in chief, you have got an entirely different situation if you reach that point.

MR. MOYE: If we reach that point Your Honor, I would have to make a new motion. This covers only the motion hearing right now.

MR. SHAFER.: Do I understand the court is going to close these doors and deprive my client of public trial?

THE COURT: Yes, Sir, on the motion.

MR. SHAFER: Respectfully except.

THE COURT: Anything further?

MR. MOYE: Your Honor, to what extent? Would that include all persons other than witnesses, necessary court personnel, parties and the lawyers to these proceedings right now?

THE COURT: Have to, have to.

MR. MOYE: Thank you, Your Honor. Should we post a bailiff at each door to protect this case?

THE COURT: Yes, Sir.

MR. SHAFER: I want a record, Your honor. I have here several people who are vitally [p. 13] important to me, since I have no law clerk, who need to be at my beck and call so that I can have them run errands, so I can give them instructions to make telephone calls, obtain witnesses for me and to do any and all of the myriad of (sic) things that an attorney needs to do in order to effectively render assistance of counsel. One of them is my secretary and my wife. Another one is Mr. Evans and that is all at the moment. And I respectfully ask that they be permitted to stay.

MR. MOYE: I have no objection, Your Honor, to Mr. Shafer's wife and secretary remaining. I do as to Mr. Evans. He is a party to a different set of proceedings, not to these proceedings at this time.

THE COURT: Is he a witness?

MR. MOYE: He's not a witness, he's not a party, he's not a lawyer.

THE COURT: What is his function? He's not an officer of the court.

MR. SHAFER: No, he's not an officer of the court. He's working for me. He's going to run errands for me.

THE COURT: Well, he can run all the errands you desire. Just speak to him out there in the hall. No problem about that. All right, Sir. Give him a chair out there so he'll be available in case you need [p. 14] him.

All right. Now, be sure and check to see if everybody is out.

(Whereupon the courtroom is cleared.)

THE COURT: Now who do we have left in the court room? Mr. Shafer's wife?

MR. MOYE: And Mr. Kimsey and Miss Nolan and they will be the state's first two witnesses.

THE COURT: Mr. Moye, I don't want to become involved but this statute on publication, is, as I have used the word very tight statute. And I think that means everybody must go except the defendants, counsel, necessary witnesses of course who appear, and the officers of the court.

MR. MOYE: Lt. Townley will be a witness and I'm simply asking that he be allowed to within the discretion of the court remain in the courtroom.

THE COURT: He'll be a witness?

MR. MOYE: He'll be a witness, yes, Your Honor. Mr. Kimsey and Mrs. Nolan will be witnesses and will be the state's first witnesses and I anticipate before we get into any of the

evidence that one of them will be sequestered and the other will be put on the stand and that beyond that, the state has no one else. I have even sent my investigator out of [p. 15] the courtroom.

THE COURT: All right.

MR. SMITH: If your Honor please. I'd like to interpose an objection to the two witnesses from the Clerk's office and also to Mr. Shafer's wife remaining in the courtroom.

THE COURT: I think you're right.

MR. MOYE: Mr. Shafer requested. I will consent to her remaining but if Mr. Smith wishes her out, then I will withdraw my consent.

THE COURT: I will grant the motion.

* * *

ORDER PARTIALLY OVERRULING DEFENDANTS' MOTIONS TO SUPPRESS (ENTERED JUNE 29, 1982)

[CAPTION OMITTED]

ORDER

The Motions to Suppress filed and on behalf of JASON BROWN, JOHN PAUL COUEY, LOUIS PATRICK NELSON, EARNESTINE PALMER, GEORGE W. SULLIVAN, ALMA ELIZABETH SULLIVAN, WILLENE TEAGUE, LUKE TEAGUE, GUY WALLER, HUDSON ASHLEY, SANDRA ASHLEY, EULA BURKE, W. B. BURKE, ARCHIE THOMPSON, HERSHELL HARPER, CLARENCE COLE, JERRY LAMAR COLE, LOUISE ALLEN, MARION LEWIS ALLEN, A. DICKIE ALLEN having come before this Court, and evidence and argument having been heard and considered by the Court, the Court enters the following Order:

The Amendments to the Motions to Suppress filed on June 28, 1982, after the joining of issue and without good cause having been shown, are ordered dismissed.

As to the documents contained in Defendant's Exhibits numbered 250 through 259, the Motions are granted.

As to all other evidence, the Motions are hereby denied.

SO ORDERED, this 29th day of June, 1982.

/s/ OSGOOD O. WILLIAMS

Judge, Superior Court
Atlanta Judicial Circuit

OPINION OF GEORGIA SUPREME COURT (ENTERED JUNE 1, 1983)

[CAPTION OMITTED]

CLARKE, JUSTICE.

Appellants and others were indicted and charged with violation of the Georgia Racketeer Influenced and Corrupt Organizations Act (OCGA § 16-14-1, *et seq.* (Code Ann. § 26-3401 *et seq.*)) and convicted of the offenses of commercial gambling and communicating gambling information. This appeal does not concern the sufficiency of the evidence except in regard to the question of venue.

The evidence at trial showed that appellants participated, with hundreds of others on a lower level, in a lottery ring which involved gambling on the volume of stocks and bonds traded on the New York Stock Exchange. The information was transmitted by telephone and telecopier and stored in a micro-computer maintained by appellant Cole.

(1) The basis of this court's jurisdiction is that appellant has made a facial attack on OCGA § 16-14-7(f) (Code Ann. § 26-3405) of the forfeiture provision of the Georgia Racketeer Influenced and Corrupt Organizations Act (hereinafter RICO). The State argues that jurisdiction is not in this court because the constitutional challenge was not properly raised in the trial court and because appellants have no standing to raise the constitutionality of the forfeiture procedure since the evidence presented at trial was seized pursuant to search warrants. We find that the constitutional issue was properly raised at trial and that appellants have standing to raise it on appeal.

Appellants contend that the statute is unconstitutional because it authorize seizure of "[a]ll property of every kind used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity" prior to filing a complaint for a RICO in rem forfeiture proceeding and prior to the obtaining of a writ of seizure. Appellants insist that this statute is on its face violative of the Fourth Amendment to the United States Constitution.

We find that the provision in question, OCGA § 16-14-7(f) (Code Ann. § 26-3405) is constitutional on its face. A seizure under this section is allowed only in carefully prescribed circumstances. The seizure must be incident to a lawful arrest, search or inspection, and the officer must have probable cause to believe that the property is subject to forfeiture or that the property will be lost or destroyed if not seized. There is no Fourth Amendment problem with the seizure or the fruits of a lawful search or inspection. The statute on its face provides that the search or inspection must be lawful. This requires that the search be pursuant to a warrant, incident to a lawful arrest, or in the presence of other exigent circumstances, which would render the search or inspection "lawful." By definition, therefore, the statute complies with the Fourth Amendment. For a discussion of exigent circumstances, see *New York* v. *Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981); *Chimel* v. *California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.E.2d 685 (1969); *Warden* v. *Hayden,* 387 U.S. 294, 87 S.Ct. 1642, 18 L.E.2d 782 (1967).

Seizure of contraband, evidence, or weapons not listed on a search warrant by an officer executing an arrest warrant or search warrant does not violate the due process clause of the Fourteenth Amendment even though there has been no notice and hearing. *Calero-Toledo* v. *Person Yacht Leasing Co.,* 416 U.S. 663, 94 S.Ct. 2080, 40 L.E.2d 452 (1974). See also *Fuentes* v. *Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.E.2d 556 (1972).

(2) The next question before us is whether the statute was applied in an unconstitutional manner as to appellants. According to appellants, officers acting under search warrants went far beyond the scope of the warrants in conducting general searches and seizing all manner of personal items including jewelry, letters, school report cards, unopened strong boxes and other items which were then sifted at leisure by the police in a search for evidence. Such items as were unlawfully seized were excluded from evidence at trial pursuant to a motion to suppress. It is appellant's contention that because certain property seized was outside the warrant, all of the

evidence should have been suppressed. Appellants rely on *Marron* v. *United States,* 275 U.S. 192, 48 S.Ct. 74, 72 L.E.2d 231 (1927), *United States* v. *LaVallee,* 391 F.2d 123 (2d Cir. 1968), and *United States* v. *Pinero,* 329 F. Supp. 992 (S.D.N.Y. 1971), in support of their position. In *Marron* v. *United States,* the Court held that under the Fourth Amendment a search warrant describing intoxicating liquors and articles for their manufacture did not authorize seizure of a ledger and bills of account. However, finding that the ledger and bills were seized incident to a lawful arrest, the Court affirmed the appellant's conviction. In *United States* v. *LaVallee* and *United States* v. *Pinero,* the warrant did not describe the items at issue. Since the search was not conducted under any exception to the warrant requirement of the Fourth Amendment, the items not described in the warrant were suppressed. These cases stand for the rule that evidence improperly seized is inadmissible. There is no requirement that where evidence has been lawfully seized it must be suppressed if officers unlawfully seized other material, unless the unlawfully seized evidence led to the discovery of the evidence which was admitted.

(3) Appellants contend that their convictions should be overturned because the term of court at which they should have been tried under their demands for a speedy trial had expired. OCGA § 17-7-170(b) (formerly Code Ann. § 271901) provides: "If the person is not tried when the demand is made or at the next succeeding regular court term thereafter, provided at both court terms there were juries impaneled and qualified to try him, he shall be absolutely discharged and acquitted of the offense charged in the indictment or accusation." For demand to cause the time to begin to run there must be a jury impaneled and qualified to try the defendant. *DeKrasner* v. *State,* 54 Ga. App. 41, 187 S.E.2d 402 (1936). Here the trial court found that there was no jury impaneled to try the case during the term in which appellants filed their demands. Consequently, the time allowed by the two-term trial requirement did not begin to run until the term following that during which the demand was filed. In the absence of clear and convincing evidence to the

contrary, we will not disturb the trial court's finding that no jury qualified to try appellants was impaneled during the term in which the demand was filed. *Wilson* v. *State,* 156 Ga. App. 53, 274 S.E.2d 95 (1980). See also, *State* v. *McDonald,* 242 Ga. 487, 249 S.E.2d 212 (1978).

(4) In their next enumeration of error appellants complain that the trial court erred in ordering the courtroom closed during the hearing on the motion to suppress. Appellants insist that this constitutes a violation of their rights under our holding in *R.W. Page Corp.* v. *Lumpkin,* 249 Ga. 576, 292 S.E.2d 815 (1982). In the hearing here, information was revealed which was potentially harmful to others, would tend to violate the privacy of others, and might prejudice other potential defendants. Under these circumstances, the court balanced appellants' rights to a public hearing on the motion against the privacy rights of others and closed the hearing. The court exercised its inherent power "... to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice." *Lowe* v. *State,* 141 Ga. App. 433, 435, 233 S.E.2d 807 (1977). We find that appellants' Sixth Amendment right to a public trial was not violated. There is some question whether state or federal law would have required that the wiretap information be revealed only in a closed courtroom. OCGA § 16-11-64(b)(8) (Code Ann. § 26-3004); 18 U.S.C.A. § 2517. We need not reach this question since the thrust of appellants' argument is that the court failed to follow the procedure announced in *R.W. Page Corp.* v. *Lumpkin,* supra. This argument has no merit since the hearing in question occurred before that case was decided and before the procedural requirements set forth took effect.

(5) Appellants allege error in the admission of evidence gathered by electronic surveillance in counties other than Fulton County pursuant to warrants obtained in Fulton County and in the court's denial of appellants' motion to amend their motion to suppress to reflect facts in support of this allegation. Since we find that the amended motion to suppress was not timely made, we need not address the question whether the evidence should have been admitted. OCGA § 17-530 (former

Code Ann. § 27-313) provides that a motion to suppress the fruits of an unlawful search and seizure shall be in writing and state facts showing that the search and seizure was unlawful. Although there is no time limit set out in the statute for the filing of a motion to suppress, the statute has been interpreted as requiring that the motion be made before the issue is joined. *Perryman* v. *State*, 149 Ga. App. 54, 253 S.E.2d 444 (1979); *State* v. *Shead*, 160 Ga. App. 260, 286 S.E.2d 767 (1981). We interpret this to mean before the defendant enters his written plea. Although not controlling here, the federal wiretap statute provides that a motion to suppress the fruits of an illegal wiretap be made "... before the trial, hearing or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion." 18 U.S.C.A. § 2518(10)(a).

In the present case the trial judge, after hearing, specifically found that the amended motion was made after issue was formally joined and without any showing of good cause. We find no error in the court's refusal to grant the motion to amend.

(6) Appellants assert that certain evidence which the state discovered through electronic surveillance pursuant to OCGA § 16-11-64 (Code Ann. § 26-3004) should not have been admitted in evidence because it had been disclosed to the Federal Bureau of Investigation, the Georgia Bureau of Investigation, the Organized Crime Prevention Council and the Internal Revenue Service. In support of this position, appellants point to OCGA § 16-11-64(b)(8) (Code Ann. § 26-3004), which limits the state's right to publish information obtained under an electronic surveillance warrant "other than that necessary and essential to the preparation of an actual prosecution for the crime specified in the warrant...." The section then mandates that should a prohibited publication occur, the published information may not be admitted into evidence.

The state counters with the argument that no violation occurred here because federal law authorizes this type information be disclosed to other investigative or law enforcement officers to the extent that such disclosure is appropriate to the

proper performance of the official duties of the officer making or receiving the disclosure. 18 U.S.C. § 2517(1). The state also cites *Morrow* v. *State,* 147 Ga. App. 395, 249 S.E.2d 110 (1978), *cert. denied,* 440 U.S. 917, 99 S.Ct. 1235, 59 L.Ed. 2d 467 (1979), and *Cox* v. *State,* 152 Ga. App. 453, 263 S.E.2d 238 (1979). In these cases the Court of Appeals held that the disclosure of such information to other law enforcement officers does not cause the information and evidence to be inadmissible.

In the case before us, the disclosure of the information was specifically authorized by a court order which cited both the state and federal statutes and listed the agencies to whom the disclosure could be made. The import of the order is that the superior court judge entering the order concluded that the sharing of information between law enforcement agencies was in fact necessary and essential to the preparation and actual prosecution for the crime specified in the warrant. In view of the fact that this prosecution is for violations of the statute aimed at organized crime, it is reasonable to find that organized efforts of law enforcement agencies are essential and necessary. This finding is supported by the clear language of OCGA § 16-14-2(b) (Code Ann. § 26-3401), which sets forth the intent of the General Assembly in enacting the RICO statute, to impose sanctions against "an interrelated pattern of criminal activity, the motive or effect of which is to derive pecuniary gain." Our interpretation of the General Assembly's intent to foster cooperation between law enforcement agencies as necessary to the prosecution of organized crime is further borne out by a recent amendment to the RICO statute authorizing reciprocal agreements with the chief prosecutors of any jurisdictions having substantially similar statutes. OCGA § 16-14-10(b) (Code Ann. § 26-3409), Ga. L. 1982, p. 1385, § 12.

(7) Appellants' seventh, eighth, ninth and tenth enumerations of error deal with appellants' claim that the state used straw "co-defendants" as informants at trial in spite of appellants' written demand before arraignment that the state disclose such information. The conversations between investigative officers and the informants were recorded and reviewed by the trial judge, who found that the tapes corroborated the testi-

mony of the officers that no defense tactics were revealed and that no prosecutorial misconduct occurred. As the state points out, the only relief sought by appellants was disclosure of the informants. At the time of the hearing on the motion to suppress, the state indicated that the names of the informants had been disclosed and that the informants had been shown no special treatment. While we share the trial court's concern that the police tactics used here could lead to abuse, we find no error in his conclusion that no abuse of appellants' rights occurred in this case.

(8) Appellants complain that sworn oral testimony outside the affidavit was considered by the magistrate who authorized the wiretap. There is no merit to this enumeration since the magistrate issuing the search warrant may consider sworn oral evidence outside the affidavit to establish probable cause. *Simmons* v. *State,* 233 Ga. 429 211 S.E.2d 725 (1975); *Cox* v. *State,* 152 Ga. App. 453, 263 S.E.2d 238 (1979). See also 18 U.S.C.A. § 2518(2). We decline counsel's invitation, as did the Court of Appeals in *Cox,* supra, to adopt Rule 4(c), F.R.Cr.P. which requires recordation of sworn oral testimony.

(9) The contention that the court erred in limiting cross-examination of witnesses in the hearing in the motion to suppress is without merit. As the United States Supreme Court noted in *Aguilar* v. *Texas,* 378 U.S. 108, 109, n.1, 84 S.Ct. 1509, 1511, n.1, 12 L.E.2d 723 (1964). "It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention." Although appellants also complain that the affiant was allowed to testify to the facts not in the affidavit, in fact, the record shows that affiants' testimony was limited to information presented to the magistrate.

(10) The trial court did not err in finding probable cause for the magistrate to issue the warrants despite certain mistakes of fact in the affidavit. There being sufficient information to support a finding of probable cause even discounting the mistaken information, the court did not err in finding that the affidavit was sufficient. *Franks* v. *Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.E.2d 667 (1978).

(11) Following a recess in the suppression hearing a witness stated that before proceeding with his testimony he needed to clarify testimony given earlier. He stated that the review of his investigative report and his affidavit during the recess "cleared my mind." Defense counsel asked if the report were available, and the witness replied that it was not, that it was in the possession of the district attorney. Defense counsel moved for production of the report, and the court denied the motion. Appellants argue that they were entitled to see the investigative report from which the witness refreshed his recollection.

The rule in Georgia is that even had the witness had the report before him on the stand, the defendant could not have procured the report as a matter of right simply by virtue of the fact that the witness used it to refresh his recollection. *Williams* v. *State,* 250 Ga. 664, 300 S.E.2d 685 (1963). "The defendant had no right to examine the witness' report which was used to refresh his memory and which was not in evidence." Id. at 665, 300 S.E.2d 685. See also *Jackson* v. *State,* 242 Ga. 692, 251 S.E.2d 282 (1978). It is true that this rule has been criticized as interfering with defendant's right to a thorough and sifting cross-examination. See dissent of Hill, C. J., *Williams* v. *State,* supra. However, in the present case, where the witness refreshes his recollection prior to taking the stand and has no notes in his possession, there can be no question that the state is under no greater compulsion to produce the report than if the witness had reviewed it before the trial began. In order for this report to be discoverable there must have been some reason other than the fact that it was reviewed by the witness.

(12) The enumeration of error regarding venue is deemed abandoned. Rules of the Supreme Court of the State of Georgia, Rule 45.

Judgment affirmed. All the Justices concur, except Hill, C. J., and Smith, J., dissent to division 3, Smith, J., dissents to division 5, Smith, J., and Weltner, J., dissent to division 6, Hill, C. J., and Smith, J., dissent to division 11.

Gregory, J., concurs in the judgment and concurs specially in division 11.

GREGORY, J., concurring specially. I concur in the judgment in this case and specially in division 11. Where a witness on the witness stand uses a writing or any other thing to refresh his recollection, it ought to be subject to examination by opposing counsel. See Chief Justice Hill's dissenting opinion in *Williams* v. *State,* 250 Ga. 664, 668, 300 S.E.2d 685 (1983). However, where the writing or other thing is not available in the courtroom access by counsel must depend upon the rules of discovery.

HILL, Chief Justice, dissenting. I dissent to division three (3) of the majority opinion. See *The State* v. *McDonald,* 242 Ga. 487, 489, 249 S.E.2d 212 (1978) (Hill, J. dissenting).

I also dissent to division eleven (11). See *Williams* v. *The State,* 250 Ga. 664, 668, 300 S.E.2d 685 (1983) (Hill, C. J., dissenting). There a minority of this court concluded that "... where a state's witness utilizes a report or other writing to refresh the witness' recollection, denying defense counsel the right to examine such writing constitutes a denial of the right of cross-examination." In my view, it makes no difference whether the witness uses the report to refresh his or her recollection while on the witness stand, or during a recess in the trial. The result is the same; the opposing party has been denied the right to a thorough and sifting cross-examination. This is particularly true where the district attorney shows the report to the witness, and the witness, with recollection thus refreshed, purports to "clarify" testimony given before the recess. The reference by the witness to the writing lends credibility to the "clarification," which opposing counsel is denied the opportunity to refute by reference to the writing. I therefore dissent.

I am authorized to state that Justice Smith joins this dissent.

NOTICE OF DENIAL OF MOTION FOR REHEARING (JUNE 28, 1983)

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta 6/28/83

The motion for a rehearing was denied today:

Case No. 39385, *Waller et al.* v. *The State.*

Hill, C. J., Smith & Weltner, JJ., dissent.

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

NO. 83-321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GUY WALLER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether the trial court properly ordered the courtroom closed during the hearing on the motion to suppress.

2.

Whether the Supreme Court of Georgia properly concluded that O.C.G.A. § 16-14-7(f); Ga. Code Ann. § 26-3502(d)(2) is constitutional on its face.

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TABLE OF AUTHORITIES

Statutes

NO. 83-321

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI1
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Guy Waller, was indicted along with numerous others on February 9, 1982, by the Grand Jury of Fulton County on charges of violation of the Georgia Racketeer Influenced and Corrupt Organizations Act. All

defendants entered pleas of not guilty. A trial was begun on June 21, 1982 for the Petitioner and others. At the conclusion of the trial, Petitioner was found guilty of commercial gambling and communicating gambling information. Petitioner was sentenced to five years with three years to serve and the balance to be served on probation, a $20,000 fine and twelve months probation on another charge. (R. 200, 207-8).

The facts in the case show that between June, 1981, and January, 1982, the various defendants participated in a gambling organization which conducted a lottery based on the daily stock and bond volume on the New York Stock Exchange. This "lottery" was conducted in the metropolitan Atlanta

area. Gambling information was transmitted by way of electronic means and stored in a microcomputer maintained by Defendant Clarence Cole.

Prior to trial, a hearing was held on the motion to suppress. The state filed a motion on June 14, 1982, to close the hearings to the public. In making this motion, the state asserted that the hearing was going to involve evidence of a sensitive nature. The litigation on the motion would of necessity involve the introduction of evidence which would affect other individuals not on trial at that time and individuals not indicted at this time. A portion of this information involved certain wire tap evidence. Under O.C.G.A. § 16-11-64(a)(8); Ga. Code Ann. § 26-3004(k), "Any

publication of the information or evidence obtained under a warrant issued hereunder other than that necessary and essential to the preparation of and actual prosecution of the crime specified in the warrant shall be an unlawful invasion of privacy under this part and shall cause such evidence and information to be admissible in any criminal prosecution." Therefore, in order to allow the state to utilize the same information in subsequent prosecutions against other individuals, the state sought to close this portion of the moton hearing so as not to taint the evidence and preclude subsequent use against individuals not then on trial. The court concluded that if the evidence was going to be offered

at the trials of other offenders, the presentation of the evidence at the hearing on the motion to suppress would amount to publication and would taint the evidence. (M.T. 6-8).

Attorney Charles Smith agreed with the observation made by the state and concurred with the request, particularly insofar as the motions were concerned. He did not concur as to the trial. Attorney Herbert Shafer opposed the closure and asserted that he would insist on the constitutional right to an open trial. (M.T. 11).

Subsequently, the court granted the motion to close the proceedings as to the hearing on the motion to suppress. Attorney Shafer sought to have some people remain in the courtroom, but the trial court ruled

that the statute was very specific, "And I think that means everybody must go except the defendants, counsel, necessary witnesses of course who appear and the officers of the court." (M.T. 14). Attorney Smith further interposed an objection to Attorney Shafer's wife remaining in the courtroom. The court granted the motion to close the proceedings and excluded all individuals except those enumerated by the court.

After the trial and convictions, the Petitioner and the other defendants filed a direct appeal to the Supreme Court of Georgia challenging, among other things, the closure of the courtroom and the constitutionality of O.C.G.A. § 16-14-7(f); Ga. Code Ann.

§ 26-3405(d)(2). That court affirmed the conviction and sentences and concluded that the particular code section was constitutional on its face and did not violate the Fourth Amendment. The court also concluded that the statute was not unconstitutional as applied in this case. In reviewing the issue of closure, the court concluded that the trial court balanced the rights to a public hearing against the privacy rights of others and closed the hearing. Under those principles, the court concluded that the Sixth Amendment right to a public trial was not violated. Waller, et al. v. State, 251 Ga. 124, ____ S.E.2d ____, 1983). (See Petitioner's Appendix A). The motion for rehearing was

denied by that court on June 18, 1983. The instant petition for a writ of certiorari was then filed in this Court.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE TRIAL COURT PROPERLY RULED TO CLOSE THE HEARING ON THE MOTION TO SUPPRESS PRIOR TO TRIAL.

Petitioner presents as the first issue before this Court a challenge to the trial court's closure of the courtroom during the hearing on the motion to suppress. Petitioner has asserted that this closure violated his right to a public trial under the Sixth Amendment.

At the beginning of the hearing on the motion to suppress, the state reasserted the formal motion for closure because it would be necessary during the hearing on the motion to utilize evidence which could involve a

reasonable expectation of privacy of persons who were not presently on trial. This motion was made based on the provisions in O.C.G.A. § 16-11-64(a)(8); Ga. Code Ann. § 26-3004(k) addressing publication of wire tap information and subsequent use of that information in other prosecutions. The Supreme Court of Georgia addressed this issue and found the following:

> In the hearing here, information was revealed which was potentially harmful to others, would tend to violate the privacy of others and might prejudice other potential defendants. Under these circumstances, the court balanced appellants' right to a public hearing on the motion against the

privacy rights of others and closed the hearing.

Waller v. State, supra.

The Court noted that the trial court properly exercised its inherent power "to preserve order and decorum in the courtroom to protect the rights of parties and witnesses, and generally to further the administration of justice." Lowe v. State, 141 Ga. App. 433, 435, 233 S.E.2d 807 (1977). Under those circumstances, the Supreme Court of Georgia concluded that the Petitioner's Sixth Amendment right to a public trial was not violated.

The trial court was faced with a situation involving evidence secured during court-authorized electronic surveillance. The state had announced

its intention to and did play portions of this electronic surveillance during the motion hearing to establish probable cause. The trial court had the responsibility to protect privacy of the defendant and individuals not then on trial and those individuals not under indictment at that time. Due to the fact that the right of privacy is specifically recognized in the statute authorizing court-authorized electronic surveillance, the right of access and the right to a public trial may be legitimately limited under the narrow circumstances presented by the instant case. See United States v. Dorfman, 690 F.2d 1230 (7th Cir. 1982); Application of Kansas City Star, 666 F.2d 1168 (8th Cir. 1981).

Based on the particular circumstances in the instant case, Respondent submits that the trial court acted properly in closing the hearing on the motion to suppress to protect the privacy of other individuals not being tried at that time. In balancing the rights presented, the court properly exercised its discretion and did not violate the Petitioner's right to a public trial in the instant case. Therefore, Respondent submits that no federal constitutional issue is presented by this claim.

B. THE GEORGIA SUPREME COURT PROPERLY CONCLUDED THAT O.C.G.A. § 16-14-7(f); GA. CODE ANN. § 26-3405(d)(2) DOES NOT VIOLATE THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner asserts that O.C.G.A. § 16-14-7(f); Ga. Code Ann. § 26-3405(d)(2) violates the Fourth Amendment in that it allows unbridled discretion to police officers in executing a search and allegedly constitutes impermissible delegation of magisterial duty.

The statute in question is a subsection of the provisions for forfeiture of property under the Racketeer Influenced and Corrupt Organizations Act (Georgia RICO Act).

Under the section in question, various provisions are set forth for forfeiture proceedings. The statute specifically declares certain property be subject to forfeiture and sets out specific procedures for the forfeiture. The proceeding is one to which the Georgia Civil Practice Act applies. The particular subsection of the statute in question provides as follows:

> Seizure may be effected by a law enforcement officer authorized to enforce the penal laws of this state prior to the filing of the complaint and without a writ of seizure if the seizure is incident to a lawful arrest, search or inspection and the officer has probable cause to believe the

property is subject to forfeiture and will be lost or destroyed if not seized. Within ten days of the date of seizure, the seizure shall be reported by the officer to the district attorney of the circuit in which the seizure is effected; and the district attorney shall, within thirty days of receiving notice of seizure, file a complaint for forfeiture. The complaint shall state in addition to the information acquired in subsection (e) of this Code section, the date and place of seizure.

O.C.G.A. § 16-14-7; Ga. Code Ann. § 26-3405(d) (2).

The Georgia Supreme Court considered the challenge to this

particular code section on its face and noted that a seizure under this section is allowed only in certain prescribed circumstances. The seizure must be pursuant to a lawful arrest, search or inspection and, further, the law enforcement officer must have probable cause to believe that the property is subject to forfeiture or the property will be lost or destroyed if not seized. As the statute specifically provides on its face that the search or inspection must be lawful, there is clearly a requirement that the search be made either pursuant to a warrant, incident to a lawful arrest, or under other exigent circumstances which would render the search or inspection lawful. Therefore, as noted by the Georgia Supreme Court, by definition the

statute complies with the Fourth Amendment. Waller v. State, supra.

The statute in question provides four conditions precedent to the seizure of property under this subsection. The first requirement is that the seizure be made by a law enforcement officer authorized to enforce the penal laws of this state. This requirement is clearly constitutional on its face.

The subsection secondly requires that the seizure be made incident to a lawful arrest, search or inspection. As noted by the Supreme Court of Georgia, the designation of the search or inspection as "lawful" is clearly in compliance with the Fourth Amendment to the United States Constitution.

In addition to these two requirements, the seizing officer must

also have probable cause to believe that the property is subject to forfeiture as provided in O.C.G.A. § 16-14-7(a); Ga. Code Ann. § 26-3405(8). In addition, officers would be authorized to seize other evidence which is in plain view at the time the search is executed. Those officers making an arrest are also allowed to search persons and their immediate presence for evidence without a warrant specifically listing those particular items. See New York v. Belton, 453 U.S. 454 (1981). Therefore, an officer who is executing a valid arrest warrant or a valid search warrant may seize contraband, evidence or weapons under the prescribed circumstances without these items necessarily being listed on the search warrant. Items subject to

forfeiture may be dealt with in a similar fashion. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

The fourth requirement set forth by the statute is that the officer have probable cause to believe that the property will be lost or destroyed if not seized. This is similar to the exigent circumstances requirement utilized in standard search and seizure situations. Exigent circumstances have been recognized in various settings, including the automobile exception created in Carroll v. United States, 267 U.S. 132 (1925) and subsequently followed in Chambers v. Maroney, 399 U.S. 42 (1970). Exigent circumstances have also been recognized in the "hot pursuit" exception set forth in Warden

v. Hayden, 387 U.S. 294 (1967) and the search incident for the arrest exception in Chimel v. California, 395 U.S. 752 (1964).

Respondent submits that as the four conditions precedent set forth in this subsection do not violate the Fourth Amendment to the United States Constitution, the code section in question is clearly constitutional on its face.

Petitioner has also asserted that the court should have suppressed all evidence seized rather than only that evidence which the court concluded had been improperly seized. This argument was made based on an assertion that this was a general search and everything seized should be suppressed pursuant to the exclusionary rule.

The Georgia Supreme Court noted that such items as were unlawfully seized were excluded from evidence pursuant to the motion to suppress. In Marron v. United States, 275 U.S. 192 (1927), cited by the Petitioner, it was concluded that a search warrant describing intoxicating liquors and articles for the manufacturer did not specifically authorize a seizure of a ledger and bills of account. The court went on to find, however, that the ledger and bills were seized incident to a lawful arrest.

In Kremen v. United States, 353 U.S. 346 (1956), there were no search warrants in existence. The search of the persons and the premises was made based on arrest warrants for only two of the persons present. Under those circumstances, it was concluded that

the evidence was not seized from persons for whom the officers had arrest warrants; therefore, the evidence was not legally seized.

The Petitioner's reasoning that all items and information seized pursuant to a valid search warrant should be excluded when the officers may have gone beyond the scope of the search warrant is not justified under the instant circumstances because it is clearly a deviation from the purposes intended to be served by the exclusionary rule. The purposes of the exclusionary rule and the intent of the Fourth Amendment are served by excluding evidence improperly seized, not by excluding evidence which was properly seized at the same time. Therefore, Respondent asserts that no such requirement should be

established. Furthermore, contrary to the assertions of the Petitioner, this did not deprive the Magistrate of the opportunity to exercise meaningful supervision and define the limits of the warrant. As evidence was excluded which was allegedly illegally seized, the question as to the Magistrate's supervision is simply not presented.

Therefore, Respondent submits that the code section attacked in the instant petition does not violate the Fourth Amendment either on its face or as applied to the Petitioner in the instant case. Therefore, no federal constitutional question is presented for review by this Court.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Guy Waller.

Respectfully submitted,

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Executive Assistant
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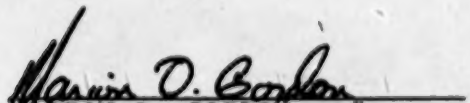

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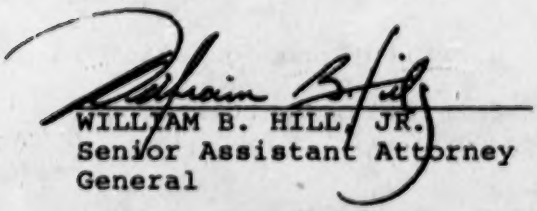

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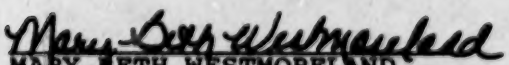

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CERTIFICATE OF SERVICE

I, MARY BETH WESTMORELAND, a member of the bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of same in the United States amil with proper address and adequate postage thereto to:

Herbert Shafer
432 Delmont Drive, N.E.
Atlanta, Georgia 30305

James K. O'Malley
205 Ross Street
Pittsburgh, Pennsylvania
15119

This 11th day of October, 1983.

MARY BETH WESTMORELAND

Nos. 83-321 & 83-322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GUY WALLER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

CLARENCE COLE, *et al.*,

Petitioners,

v.

STATE OF GEORGIA,

Respondent.

On Writs of Certiorari to the Supreme Court of the State of Georgia

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January 1984

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QUESTIONS PRESENTED

1. May a suppression hearing be closed, over the objection of the accused, to protect the "privacy" rights of parties to telephone conversations that the police have recorded and intend to use to "validate" the gathering of other evidence, where (a) the privacy interests said to be at stake in the case are not found to be substantial, (b) no attempt is made to protect those interests by means short of closure, and (c) closure is ordered not simply while the tapes are played, but for the entire suppression hearing?

2. Does Georgia Code § 16-14-7(f) violate the Fourth and Fourteenth Amendments by authorizing a law enforcement officer to seize, without prior judicial approval and without notice or hearing, any private property that "the officer has probable cause to believe . . . is subject to forfeiture" in civil proceedings, where (a) by definition, nothing about such property could disclose that it *is* "subject to forfeiture," and (b) the statute defines potentially everything in a person's home as the fruit, instrumentality, or evidence of a crime?

3. When law enforcement officers, having obtained entry on the basis of a facially valid search warrant, conduct a general search of a person's home and a wholesale seizure of his possessions in flat disregard of the scope of the warrant and of the Fourth Amendment's probable cause and particularity requirements, may the State use any of the fruits of the search against that person in a criminal trial?

PARTIES BELOW

Appellants below, petitioners herein, were Guy Waller, who is the petitioner in No. 83-321, and Clarence Cole, Eula Burke, W. B. Burke, and Archie Thompson, who are the petitioners in No. 83-322. Appellee below, respondent herein, was the State of Georgia.

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TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-321 & 83-322

GUY WALLER,

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STATE OF GEORGIA,

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STATE OF GEORGIA,

Respondent.

On Writs of Certiorari to the Supreme Court of the State of Georgia

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BRIEF FOR PETITIONERS

Pursuant to Rule 34 of the Rules of this Court, petitioners in Nos. 83-321 & 83-322 respectfully submit this joint brief.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported at 251 Ga. 124, 303 S.E.2d 437, and appears at pages 20a-28a

of the Joint Appendix ("J.A."). That court's order denying rehearing is reprinted at J.A.29a.[1]

The trial court's order granting the State's closure motion was oral and unreported; the portions of the transcript of the hearing in which the trial court granted the motion are reprinted at J.A.13a-18a. The trial court's order with respect to petitioners' suppression motion is unreported, and appears at J.A.19a.

JURISDICTION

The decision of the Georgia Supreme Court, which constitutes its judgment, was entered on June 1, 1983. (J.A.20a.) A timely-filed petition for rehearing was denied on June 28, 1983. (J.A.29a.) Petitions seeking review of the decision were timely filed on August 26, 1983, and certiorari was granted and the cases consolidated on November 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The First, Fourth, Sixth, and Fourteenth Amendments to the Constitution, and Georgia Code §§ 16-11-64(b)(8) and 16-14-7(a) & (f), are set out at J.A.1a-2a.

STATEMENT OF THE CASE

A. Nature of the Case

In early January 1982 local law enforcement officials in Georgia, armed with search warrants authorizing seizure of various specified items of "tangible evidence of the crimes of commercial gambling, communicating gambling information

[1] The decision below is cited to its report in S.E.2d, as well as to the Joint Appendix. As used herein, "S.T." refers to the transcript of the suppression hearing and "T." refers to the trial transcript.

and keeping a gambling house," swept through more than 150 homes in 12 counties across the State, including the homes of the petitioners.[2]

Despite the limited scope of the warrants, the law enforcement officers, in the words of the trial court, "just went in and took everything that was in sight." (S.T.638.) Among the things seized were gas and electric bills, jewelry, cemetery deeds, love letters, children's drawings, Christmas, Valentine's Day, and Easter cards, school report cards, wedding portraits, group family photographs, credit reports, bounced checks, credit applications and rejections, unopened strongboxes, as well as other non-contraband items not included in the search warrants. In the course of their raids, police managed to seize a blind man's rent money (T.640-42, 1778-80), the money of relatives in town from Detroit for a funeral (T.455-58), envelopes for contributions to the Rev. Billy Graham (T.579), and a booklet advertising incense and candles. (T.752.) Over 250 boxes of materials were seized.[3]

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[2] The warrants authorized seizure of

> "money; betting slips; lottery ribbons; lists of bettors; documents containing information related to gambling; computers and other information storage and retrieval devices; telecopiers and other facsimile reproduction devices; telephones and other related communication devices; radio frequency scanners and other radio communication devices, which things are subject to search and seizure as tangible evidence of the crimes of commercial gambling, communicating gambling information and keeping a gambling place . . . ."

See, *e.g.*, Warrant for Search and Seizure respecting petitioner Cole, State's Ex. 23, Ex. Vol. VI, p. 2523. The warrant appears at J.A.4a-5a.

[3] As Special Agent Smith of the Georgia Bureau of Investigation acknowledged at trial, those conducting the search picked up everything they could, "to be sorted out [later] by the people that was [*sic*] familiar with it." (T.624.) Agent Smith acknowledged that he could not make any on-the-spot determination as to whether the property he seized was "private" because "I really didn't know the names of the people involved and the ones that are not." (*Id.*) Asked whether he had "any way of knowing" whether the property he seized had anything to do with the suspected gambling activities, Agent Smith testified that he "was picking it up in the event that it had. Now if when it was sorted out it wasn't, it could all be returned." (T.629.)

(footnote continues)

The raids were part of what the State has described as "a multi-county attack on . . . organized gambling" in Georgia. (S.T.28.) The raids led to the return of an indictment by a Fulton County grand jury on February 9, 1982. Despite the invasion of privacy of more than 150 homes, the indictment charged only the petitioners and 35 others with violations of the Georgia Racketeer Influenced and Corrupt Organizations ("RICO") Act, O.C.G.A. §§ 16-14-1 to 16-14-15, and with commercial gambling and communicating gambling information under O.C.G.A. §§ 16-12-22 and 16-12-28.

The indictment followed an extensive, eight-month program of electronic surveillance during which more than 40 telephone lines were tapped pursuant to investigatory warrants, and more than 800 hours of telephone conversations recorded. County authorities immediately commenced a series of parallel civil proceedings to transfer to the State property seized during the raids, pursuant to the Georgia RICO statute's provisions for proceedings for forfeiture of "[a]ll property of every kind used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity." O.C.G.A. § 16-14-7(a).

Trial in the criminal case commenced on June 21, 1982.[4] A jury was empanelled and then excused while the trial court

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(footnote continued)

The trial transcript discloses that officers executing the search warrants made a conscious decision to seize property indiscriminately, without regard to whether such property fell within the scope of the warrants, because "we had a storm coming in on us and it was either do what we could . . . and get out of there or we would have had to camp out with Mr. Waller three or four days." (T.630; see T.386.) As one officer explained, private papers were indiscriminately seized because "I didn't feel I should stay there . . . and identify each individual piece of paper." (T.1162.)

According to one defense witness subject to the raids, the police "went through my house worse than a tornado would. Now, they didn't read nothing to me, whether they had a search warrant or what not. They didn't say nothing but go around there and sit down and be quiet." (T.1777.)

[4] Petitioners and 13 others were tried separately from the rest of those indicted, having demanded a speedy trial pursuant to O.C.G.A. § 17-7-170(a). Three of those 13 were granted directed verdicts of acquittal. (T.1759-61.) The remaining defendants asked for and received continuances (T.10-85), or pleaded to lesser offenses.

conducted a closed hearing on petitioners' suppression motion and other matters. (T.239.) The hearing lasted seven days, following which the case was tried to the jury. After nearly three days of deliberation, the jury returned a verdict acquitting five of the defendants on all counts. The jury acquitted the others, including the petitioners, of the RICO count, but convicted each of them of commercial gambling and communicating gambling information. (T.2098.)[5]

Of the petitioners here, Eula Burke was sentenced to five years' probation and ordered to pay a $10,000 fine; W.B. Burke was sentenced to two years' imprisonment and three years' probation and ordered to pay a $15,000 fine; and Clarence Cole, Archie Thompson, and Guy Waller were each sentenced to three years' imprisonment and two years' probation and ordered to pay a $20,000 fine. (T.2154-57.) Petitioners are free on bond pending appeal.

B. The Orders at Issue

The questions before this Court arise from two orders entered by the trial court on preliminary motions, and upheld by the Georgia Supreme Court: the trial court's order granting the State's motion to close the suppression hearing, and its order partly overruling defendants' motions to suppress all evidence seized during the January raids.

1. The Closure Order

On June 14, 1982, the State filed a written motion requesting that "any hearing" on defendants' motions to suppress "be closed to the public." (J.A.7a.) As justification, the State's motion asserted only that, in order to "validate" the seizure of certain electronically gathered evidence and certain other evidence, the State was required to use wiretap evidence "which may involve a reasonable expectation of privacy of persons other than those indicated in the above-styled case." (J.A.6a,

[5] With respect to the civil RICO forfeiture proceedings involving property of the petitioners, all of the petitioners have settled with the State, and, pursuant to those settlements, have received much, but not all, of their property back.

¶ 3.) The State asserted that use in open court of its wiretap evidence might be deemed an "unnecessary publication" (J.A.13a) within the meaning of O.C.G.A. § 16-11-64(b)(8), thus, in the State's view, precluding use of such evidence against other persons "not presently on trial." (J.A.13a.).[6] The State did not specifically identify or describe the wiretap evidence it proposed to offer, attempt to justify its claim that use of the evidence was necessary to its case, or explain why closure of the entire hearing was necessary.

Over the vigorous objection of defendants that closure would violate their constitutional right to a public trial (J.A.15a),[7] the trial court directed that the entire suppression hearing be closed to the public and the press. "[E]verybody must go," the trial court ruled, "except the defendants, counsel, and necessary witnesses of course who appear and the officers of the court." (J.A.17a.) The trial court ordered closure solely on the basis of O.C.G.A. § 16-1164(b)(8).

Less than two-and-one-half hours of the seven-day suppression hearing were devoted to playing tapes of intercepted telephone conversations, and the few recorded conversations actually played at the hearing were introduced and analyzed by only one witness. (S.T.366-477.)[8] The remainder of the hearing was devoted to the testimony of nearly 20 witnesses, mainly concerning the procedures utilized in obtaining and executing the search warrants and wiretap authorizations (see, *e.g.*, S.T.202-48), and the procedures followed in

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[6] O.C.G.A. § 16-11-64(b)(8) provides:

> "Any publication of the information or evidence obtained under a warrant issued hereunder other than that necessary and essential to the preparation of and actual prosecution for the crime specified in the warrant shall be an unlawful invasion of privacy under this Chapter, and shall cause such evidence and information to be inadmissible in any criminal prosecution."

[7] Unlike the others, petitioner Cole "concurred" in the State's motion to close the suppression hearing (J.A.14a), and did not seek review of the closure order below.

[8] The parties to the intercepted conversations included no one who had not been named in the indictment, and a review of the record reveals that only one person who had not been indicted was even mentioned in the recorded calls. (S.T.475.)

conducting the surveillance and in preparing and preserving the resulting tape recordings. (See, *e.g.*, S.T. 298-307, 575-83.) The hearing also focused on such issues as whether the police had afforded others unlawful access to evidence seized in the raids, and whether the prosecution and police had engaged in misconduct in negotiations with two of the defendants. (*E.g.*, S.T.741-45, 815-20.) [9] Transcripts of the entire hearing, including transcripts of the recorded conversations played behind the closed courtroom doors, were later made public—before the other defendants named in the indictment were brought to trial.

On appeal, the Georgia Supreme Court expressly declined to decide whether O.C.G.A. § 16-11-64(b)(8) "required that the wiretap information be revealed only in a closed courtroom," but nonetheless upheld the trial court's closure order over petitioners' constitutional challenge. (J.A.23a, 303 S.E.2d at 441.) The state supreme court, commenting that "information was revealed which was potentially harmful to others, would tend to violate the privacy of others, and might prejudice other potential defendants" (*id.*), held that the trial court had permissibly "balanced appellants' rights to a public hearing against the privacy rights of others." (*Id.*) The Georgia Supreme Court concluded that this was a proper exercise of the trial court's "inherent power '. . . to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice' " *Id.*, quoting *Lowe* v. *State*, 141 Ga. App. 433, 435, 233 S.E.2d 807, 809 (Ga. Ct. App. 1977).

2. The Suppression Order

On June 21, 1982, defendants moved for suppression of all wire or oral communications intercepted by the State and of all fruits thereof, and "any physical evidence seized during the execution of any search warrants issued subsequent to the

[9] Those testifying included not only the police officers who secured the warrants and conducted the surveillance and the telephone company official who assisted them (S.T.182202), but the prosecutor who prepared the warrants and underlying affidavits, and the local judge who authorized the warrants. (*E.g.*, S.T.106-79, 592-601.)

interception of Defendants' conversations and/or flowing therefrom." (J.A.8a.) Defendants further sought an order "proscribing the use of all such evidence, directly or indirectly," in any proceeding other than the suppression hearing. (*Id.*) Among other things, defendants argued that "[t]he physical searches and seizures . . . were exploratory and general and eventuated in indiscriminate seizures of property not authorized to be seized, including the private papers of the Defendants." (J.A.11a-12a, ¶ 22.)

Defendants specifically argued that the searches and seizures could not be defended on the basis of O.C.G.A. § 16-14-7(f) because the statute, in violation of the Fourth and Fourteenth Amendments to the Constitution, authorizes "unbridled seizures by the officers conducting the search without the interposition of judicial control or restraint." (J.A. 12a, ¶ 23.) In pertinent part, Section 16-14-7(f) provides that seizure of property subject to forfeiture to the State in civil RICO proceedings

> "may be effected by a law enforcement officer authorized to enforce the penal laws of this state prior to the filing of the complaint and without a writ of seizure if the seizure is incident to a lawful arrest, search, or inspection and the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if not seized." [10]

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[10] Georgia's RICO statute, Ga. L. 1980, p. 405, § 1, provides for civil *in rem* actions for forfeiture to the State of "[a]ll property of every kind used or intended for use in the course of, derived from or realized through a pattern of racketeering activity." O.C.G.A. § 16-14-7(a). Such proceedings are instituted by complaint and prosecuted by the district attorney of the county in which the property is located or seized. *Id.* § 16-14-7(d). In addition to Section 16-14-7(f)'s provision for seizure without prior judicial approval, the statute provides that, after a complaint has been filed, the court may order property seized by issuing a writ of seizure with or without notice, depending on whether there is reasonable cause to believe that prior notice would result in the loss or destruction of the property. *Id.* Any person claiming an interest in the property may become a party to the action, *id.* § 16-14-7(h)(1), and the proceedings are to be conducted as provided by the Georgia Civil Practice Act. *Id.* § 16-14-7(i). Any party may demand a jury trial. *Id.* The Georgia statute's provision for seizure without prior judicial approval has no counterpart under the federal RICO statute, 28 U.S.C. §§ 1961-1968. See page 25, note 33, below.

Defendants contended that, because the early January raids involved general searches and wholesale seizures in violation of the Fourth Amendment's probable cause and particularity requirements, all of the evidence seized—including evidence within the literal scope of the warrants—must be excluded. (S.T.603-40.) They argued that "the intrusiveness of the search [was] so . . . egregious" (S.T.623) that "everything should be suppressed." (S.T.632.) The authorities, defense counsel stated, "should have known that they were dead wrong to seize it and to do so in the face of that taints everything and everything should go out." (S.T.632.)

The State, without conceding that *any* of the evidence seized was beyond the scope of the search warrants (S.T.612-14), indicated its willingness to accede to an order suppressing the use of what it characterized as "personal or . . . arguably personal evidence" (S.T.603), explaining that it did not intend to use that evidence at trial, and was ready to return it to the defendants. (*Id.*) The trial court, stating that such "personal" evidence "is not admissible" (S.T.635), entered an order on June 29 suppressing that evidence, but overruling defendants' motion to suppress any other evidence beyond the scope of the warrants. (J.A.19a.)

The trial court refused to pass on the validity of the search warrants or the conduct of the search and seizure, declaring simply: "I'm not interested in this search warrant, whether it is a good search or a bad search." (S.T.311.) The court stated that it was interested only in whether the electronic surveillance that led to the issuance of the search warrants was proper. As the court explained, "all this business of whether [the warrants were] executed right and all that kind of thing I ain't concerned about." (S.T.314.) "I ain't gonna try no search warrant," the court stated, "I ain't gonna do it." (*Id.*) [11]

[11] The trial court thus did not order the exclusion of any evidence characterized by the State as "lottery evidence" or "RICO" evidence (see S.T.607), refusing to consider whether such evidence was beyond the scope of the warrants, or whether the warrants were valid. The trial court excluded only that evidence which the State, having decided not to use it, had been willing to characterize as "personal," and it did so without explaining why such evidence would be "inadmissible."

On appeal, the Georgia Supreme Court, on the authority of O.C.G.A. § 16-14-7(f), upheld the trial court's refusal to suppress trial evidence which had been seized in the raids, first holding the statute constitutional on its face, and then holding the statute constitutional "as applied" to petitioners. In effect construing Section 16-14-7(f) as a gloss on any search or arrest warrant obtained by the police, the court sustained the statute as facially valid because it authorizes seizures only pursuant to "a lawful arrest, search, or inspection." (J.A.21a, 303 S.E.2d at 440.) The court concluded that this limitation renders Section 16-14-7(f) consistent with the Fourth Amendment "by definition." (*Id.*) Without explanation, the court dismissed petitioners' contention that, by authorizing seizure, without prior judicial approval, of lawfully held private property, Section 16-14-7(f) violates the Due Process Clause of the Fourteenth Amendment. (*Id.*)

The court held that the statute had been constitutionally "applied" to the petitioners on the ground that "[s]uch items as were unlawfully seized were excluded." (J.A. 21a, 303 S.E.2d at 440.)[12] It added that "[t]here is no requirement that where evidence has been lawfully seized it must be suppressed if officers unlawfully seized other materials, unless the unlawfully seized evidence led to the discovery of the evidence which was admitted." (J.A.22a, 303 S.E.2d at 440.) The court therefore affirmed petitioners' convictions.

SUMMARY OF ARGUMENT

1. In this case the Court is called upon to hold applicable to suppression hearings the Sixth and First Amendment guarantees of openness applicable to criminal trials. Suppression hearings have traditionally been public; moreover, such hearings critically focus on the manner in which the criminal justice system operates, and may be the most crucial phase in a criminal case. The Constitution's guarantees of openness should therefore apply to such hearings—whether conducted after "the trial" formally commences, as here, or before. Such

[12] But see page 9 & note 11, above.

hearings should be subject to closure only upon a finding of compelling justification and unavoidable necessity.

The closure order entered in this case fell far short of that standard. Closure here was ordered, over the objection of the accused, to protect the State's interest in possible future prosecutions—prosecutions that the State insisted would be jeopardized under state law if it were permitted, during the suppression hearing, to play certain wiretap evidence only in open court. Under state law, "unnecessary publication" of wiretap evidence may be an "invasion of privacy"; here, the State claimed, "publication" might have precluded it from using such evidence in prosecutions of others "not presently on trial." The Georgia Supreme Court, without deciding whether state law required the wiretap evidence to be presented behind closed courtroom doors, held that the closure order entered by the trial court permissibly "balanced [petitioners'] rights to a public hearing against the privacy rights of others."

But any "balance" struck by the trial court here was wholly indefensible. The trial court made no finding that the privacy interests at stake in this case were substantial enough to warrant closure, or that means short of closure were unavailable to protect such interests. Indeed, transcripts of the suppression hearing, including transcripts of the State's wiretap evidence, were made public soon after the hearing. Even if such findings could have been made on the record here, the order entered below was utterly unjustifiable, for the trial court ordered the entire suppression hearing closed, and not simply those portions of the hearing during which the State proposed to play its tapes.

2. Also at issue in this case is a State's attempt to authorize, and to carry out, wholesale seizures of private property that police officers, in their sole discretion, deem to be "subject to forfeiture" under the State's RICO statute. Such property is so broadly defined as to include "all property, of whatever nature and no matter how inoffensive, if it is acquired with racketeering proceeds."[13] Because nothing about "property subject to forfeiture" marks it as having been acquired with

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[13] *Western Business Systems, Inc.* v. *Slaton*, 492 F. Supp. 513, 514 (N.D. Ga. 1980).

such proceeds, police officers are incapable of making sufficiently meaningful probable cause determinations to permit seizure of such property without prior judicial approval. Absent exigent circumstances not present in this case, due process would in any event preclude seizure of such forfeitable property without prior notice and hearing. In seeking to expand the narrow exceptions to the warrant requirement recognized in this Court's precedents, and in circumventing settled due process safeguards, the State in this case has gone farther than the Constitution allows.

3. Wholly apart from the state statute here at issue, the searches and seizures conducted here plainly violated the Fourth Amendment. The police treated the warrants under which they acted as license to perform indiscriminate searches of more than 150 homes, and wholesale seizures of personal papers and effects—notwithstanding the Fourth Amendment's requirements of particularity and probable cause. Yet the trial court flatly refused to pass on petitioners' challenges to the validity of the warrants, and to the searches and seizures performed pursuant to them; the Georgia Supreme Court similarly refused to face the issue. In these circumstances, where the police have "launch[ed] upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant,"[14] all of the fruit of such searches should have been suppressed.

ARGUMENT

I. Closure of the Suppression Hearing Violated the Sixth and First Amendments.

A. The Sixth Amendment Guarantees the Right to Open Suppression Hearings.

" 'Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.' " *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring in

[14] *Stanley* v. *Georgia*, 394 U.S. 557, 572 (1969) (Stewart, J., concurring in result).

judgment), *quoting* L. Brandeis, *Other People's Money* 62 (1933). Accordingly, no feature of the American criminal justice system is more prominent or secure than the practice of conducting criminal trials in public. It is a right guaranteed to criminal defendants by express command of the Sixth Amendment, applicable to the States through the Fourteenth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." See *Gannett Co., Inc.* v. *DePasquale,* 443 U.S. 368, 379-81 (1979).[15]

Although this Court has not yet specifically faced the issue, it is clear that the defendant's Sixth Amendment right to public trial should be held to encompass suppression hearings such as the one closed by the trial court in this case.[16] To begin with, this hearing fell literally within the confines of the "trial." The trial had actually begun when the courtroom doors were closed, for the jury had been empanelled and the "issue" had been "joined." (T. 106.)[17]

Regardless of when the suppression hearing commenced, the Sixth Amendment's guarantee of openness should have applied. It would clearly be arbitrary to restrict the Sixth Amendment's public trial right to events which transpire before

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[15] See also *Levine* v. *United States,* 362 U.S. 610, 616 (1960) (due process requires "appropriate regard for the requirements of a public proceeding" in "all adjudications through the exercise of the judicial power"), quoted in *Richmond Newspapers, Inc.* v. *Virginia,* 448 U.S. 555, 574 (1980) (plurality opinion of Burger, C.J.).

[16] In *Gannett* this Court held that "the Sixth Amendment's guarantee to the accused of a public trial gave neither the public nor the press an enforceable right of access to a *pre*trial suppression hearing." *Richmond Newspapers, supra,* 448 U.S. at 564 (opinion of Burger, C.J.). The Court did not decide whether the Sixth Amendment guarantees the *accused* a right to open suppression hearings, whether held before or during the trial.

[17] See, *e.g., United States ex rel. Bennett* v. *Rundle,* 419 F.2d 599, 606 (3d Cir. 1969) (suppression hearing which took place after the jury was empanelled "falls within the constitutional guarantee that in criminal prosecutions all trials should be public"). See also *United States* v. *Clark,* 475 F.2d 240, 244-48 (2d Cir. 1973) (right to public trial extends to suppression hearings, without regard to whether "trial" has begun). See generally *Gannett, supra,* 443 U.S. at 431-32 n.11, 436 (Blackmun, J., concurring in part and dissenting in part). Once the jury was empanelled, jeopardy attached. See, *e.g., Chatham* v. *State,* 247 Ga. 95, 96, 274 S.E.2d 473, 473-74 (1982).

a jury or to proceedings at which the trier of fact specifically considers guilt or innocence.[18] Rather, as it has in applying the closely analogous right of access under the First Amendment, see *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 605 (1982), this Court, in determining the applicability of the Sixth Amendment right of openness to a particular type of criminal proceeding, should look both to the manner in which such proceedings historically have been conducted, and to the role that openness plays "in the functioning of the judicial process and the government as a whole." *Id.* at 605-06. See also *Clark, supra*, 475 F.2d at 246-47; *Rundle, supra*, 419 F.2d at 605-06.

A history of openness is significant in constitutional terms "not only 'because the Constitution carries the gloss of history,' but also because 'a tradition of accessibility implies the favorable judgment of experience.'" *Globe Newspaper Co., supra*, 457 U.S. at 605.[19] To be sure, suppression hearings were unknown at common law; the exclusionary rule was announced,[20] and applied to the States,[21] well after the Constitution was adopted. See *Gannett, supra*, 443 U.S. at 395-96 (Burger, C.J., concurring). It is nonetheless true that even *pre*-trial suppression hearings have traditionally been open. *Gannett*, 443 U.S. at 430-32 n.11 (Blackmun, J., concurring in part and dissenting in part). And where closure of comparable pretrial proceedings has been permitted it has generally been *only* at the request of the defendant. *Id.* at 390-91.[22]

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[18] There is no automatic requirement, of course, that suppression hearings be held outside the presence of the jury. See *Pinto* v. *Pierce*, 389 U.S. 31, 32-33 (1967) (*per curiam*).

[19] Quoting *Richmond Newspapers, supra*, 448 U.S. at 589 (Brennan, J., concurring in judgment).

[20] *Boyd* v. *United States*, 116 U.S. 616 (1886).

[21] *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

[22] See, *e.g.*, Commissioners on Practice and Pleadings, *Code of Criminal Procedure* 95 (Final Report 1850), quoted in *Gannett, supra*, 443 U.S. at 390 n.22 ("To guard the rights of the defendant against a secret examination, the [Field Code] provides that [pretrial proceedings] shall not be conducted in private, unless at his request."). See also *State* v. *Williams*, 93 N.J. 39, 459 A.2d 641, 649-50 & n.5 (1983) (public pretrial criminal proceedings have traditionally been the "near uniform practice in the federal and state court systems") (collecting authorities).

(footnote continues)

This "favorable judgment of experience" is confirmed by an analysis of the Sixth Amendment values promoted by open suppression hearings. For as a majority of the Court has recognized, suppression hearings are "close equivalents" of trials and "implicate all the policies that require that the trial be open to the public." *Gannett, supra,* 443 U.S. at 436 (Blackmun, J., concurring in part and dissenting in part); *id.* at 397 n.1 (Powell, J., concurring). "In view of the special significance of a suppression hearing, the public's interest in this proceeding often is comparable to its interest in the trial itself." *Id.* And the guarantee of open criminal *trials,* as the Court has stated,

> "plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact-finding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government."

Globe Newspaper, supra, 457 U.S. at 606 (footnotes omitted). See also *Gannett, supra,* 443 U.S. at 427-33 (Blackmun, J., concurring in part and dissenting in part).

(footnote continued)

As the Court noted in *Gannett,* the rationale for a lack of a *public* right of access to pretrial proceedings in general and pretrial suppression hearings in particular is the fear of prejudicing potential jurors and the need to protect the defendant's right to a fair trial. *Gannett, supra,* 443 U.S. at 390 n.20. This fear is obviated where, as here, it is the defendant who insists on public proceedings and a jury has been empanelled and the jurors instructed not to discuss the case among themselves or with others and not to read or view press accounts of the matter. (T.238-40, 293-94.) See also *Richmond Newspapers, supra,* 448 U.S. at 581 (plurality opinion). In any event, protecting the fair trial rights of petitioners or any other defendants was not among the reasons cited by the trial court as justifying closure. Nor does the record in this case reflect any such danger from conducting the suppression hearing in public.

Clearly a suppression hearing is "often as important as the trial which may follow." *Gannett, supra,* 443 U.S. at 397 n.1 (Powell, J., concurring). Roughly 85 percent of all criminal prosecutions are terminated before trial. *Id.* at 397 (Burger, C.J., concurring). Indeed, the suppression hearing may be the *only* major proceeding in a criminal prosecution. *Id.* at 434 (Blackmun, J., concurring in part and dissenting in part). The evidence whose use is at issue may be the most compelling—perhaps the only—evidence of guilt possessed by the State. If the evidence is suppressed, the State may be forced to terminate the prosecution, or improve its plea offer; if the evidence is not suppressed the defendant may well plead guilty. See *id.* Thus, openness is essential precisely because, when a suppression hearing is held, "there is no certainty that a trial will take place." *Id.* at 397 (Burger, C.J., concurring). See also *United States* v. *Cianfrani,* 573 F.2d 835, 850 (3d Cir. 1978).

Moreover, suppression hearings are structurally identical to trials-in-chief and thus derive the same benefits from publicity —such as inducing witnesses to come forth, promoting the conscientiousness of the participants, deterring perjury, and, most important from the defendant's point of view, checking the abuse of prosecutorial and judicial power. *Gannett, supra,* 443 U.S. at 434 (Blackmun, J. concurring in part and dissenting in part). See also *Rundle, supra,* 419 F.2d at 605. Indeed, the value of publicity as a check on abuses by both law enforcement and judicial officials is nowhere greater than in suppression hearings. By definition, suppression hearings arise out of charges of serious misconduct by law enforcement officials, misconduct which has allegedly resulted in the infringement of important civil rights. Both for society and for the defendant, it is critical to ensure that such allegations are fully aired and fairly resolved without even the appearance of collusion or connivance among law enforcement and judicial officials.

This case dramatically illustrates the policies that open suppression hearings serve. The police, at the behest of the local prosecutor, with the assistance of the local telephone company and the concurrence of a local judge, conducted an eight-month wiretapping operation covering 40 different tele-

phones and resulting in the recording of over 800 hours of private conversations. The information gathered as a result of the electronic surveillance was then utilized as the basis for warrants authorizing raids of more than 150 homes and wholesale seizures of private property. Among the materials seized were many boxes of concededly "personal" materials, many of them implicating important First Amendment interests. Cf. *Stanford* v. *Texas,* 379 U.S. 476, 485 (1965).

The defense protested both the authority for this general search and the manner in which it was conducted. In the process, it challenged the conduct not only of the police but of telephone company officials, the prosecutor, and the judge, all of whom testified at length at the suppression hearing, and were subjected to vigorous cross-examination. Had not these defendants gone to trial, the closure of the suppression hearing might have kept these facts from public view entirely, for if the case had been dropped or if the defendants had entered pleas, no record might ever have been prepared. See *Gannett, supra,* 443 at 434-35 (Blackmun, J., concurring in part and dissenting in part); *Cianfrani, supra,* 573 F.2d at 850. Especially where, as here, one of those whose conduct is questioned is the judge who issued the warrants, it is important to afford visible assurance that the court conducting the suppression hearing has given the allegations of misconduct full and fair consideration. See generally *Sheppard* v. *Maxwell,* 384 U.S. 333, 350 (1966); *In re Oliver,* 333 U.S. 257, 270 (1948).

Closure erodes the public's confidence in the administration of justice, offending "the fundamental, natural yearning to see justice done." *Richmond Newspapers, supra,* 448 U.S. at 571 (opinion of Burger, C.J.). Closure of the only substantial public event in many criminal proceedings prevents the judicial system from satisfying that yearning because, if reached in secrecy, a "result considered untoward may undermine the public confidence." *Id.* And "where the [proceeding] has been concealed from public view, an unexpected outcome can cause a reaction that the system has at best failed and at worst has been corrupted." *Id.* This interest in public confidence is of acute significance to the accused: Where the public is deprived

of facts concerning the course justice is taking, "natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful 'self-help'" directed against those who are freed, *id.*, thus nullifying their rights to due process and fair trials.[23]

Because the exclusionary rule is a rule whose function is to serve the "imperative of judicial integrity," *Richmond Newspapers, supra,* 448 U.S. at 594 n.19 (Brennan, J., concurring in judgment), openness is all the more important. Whatever the merits of the rule itself, depriving the public of a full understanding of the balance struck in each case must inevitably jaundice the public's perception of the functioning of the criminal justice system. "One of the demands of a democratic society is that the public should know what goes on in its courts . . . to the end that the public may judge whether our system of criminal justice is fair and right." *Maryland* v. *Baltimore Radio Show,* 338 U.S. 912, 920 (1950) (opinion of Frankfurter, J., respecting denial of certiorari). Both for those who believe that the exclusionary rule is ill-conceived, and for the rule's defenders, open suppression hearings can only be regarded as a virtue: Without open proceedings debate over the wisdom of the rule cannot be informed. Cf. *Whitney* v. *California,* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

For all these reasons, this Court should hold that the Sixth Amendment guarantee of open criminal proceedings encompasses suppression hearings, whether conducted after "the trial" formally commences—as here—or before.[24]

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[23] Acceptance of the state's monopoly, through the criminal law, over the legitimate use of force, see *Ogden* v. *Saunders,* 25 U.S. (12 Wheat.) 213, 346-47 (1827) (Marshall, C.J., dissenting), is possible only when the public is allowed to satisfy itself that each actor has properly discharged his role in the "theatre of justice." 1 J. Bentham, *The Rationale of Judicial Evidence* 597 (J. Mill ed. 1827).

[24] Such a holding would not, of course, imply that the Sixth Amendment automatically would apply with equal force to each of the many "incidental or collateral" discussions or proceedings held outside the presence of the jury before or during trial. See *Richmond Newspapers, supra,* 448 U.S. at 598 n.23 (Brennan, J., concurring in judgment) (when trial courts conduct "inter-

(footnote continues)

B. The Trial Court Erred in Closing the Suppression Hearing Below in the Absence of any Particularized Determination or Evidence that Closure Was Necessary To Protect the Interests Said To Justify It.

This Court has never decided precisely what showing is necessary to close a criminal proceeding over the *objection* of the accused. In *Gannett*, four Members of the Court did declare that, *upon the request of the accused*, the Sixth Amendment's public trial guarantee might be overcome only upon a showing that (1) "there is a substantial probability that irreparable damage to [a compelling interest] will result from conducting the proceeding in public"; (2) there is "a substantial probability that alternatives to closure will not protect adequately [the asserted interest]"; and (3) "there is a substantial probability that closure will be effective in protecting against the perceived harm." 443 U.S. at 441-42 (Blackmun, J., concurring in part and dissenting in part). Cf. *Nebraska Press Ass'n, supra*, 427 U.S. at 562 (similar standard for gag order). No less strict a test should be applied when closure is sought, as here, *over the defendant's objection.*

Similarly, the Court has held that, in light of the the public's First Amendment right of access to criminal trials, a trial may not be closed *even at the request of the accused*, unless that closure "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper, supra*, 457 U.S. at 606-07.[25] See also *Richmond Newspapers, supra*, 448 U.S. at 581 (opinion of Burger, C.J.) (closure forbidden "[a]bsent an overriding interest articulated in findings," that cannot be served through less restrictive alternatives). Again, no less stringent showing should be

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(footnote continued)

changes at the bench," open trial guarantee does not require public or press "intrusion upon the huddle"). See also *Rundle, supra*, 419 F.2d at 605 (specifying "incidental or collateral discussions outside the presence of the jury" that need not be open to public). Cf. *Gannett, supra*, 443 U.S. at 397 n.1 (Powell, J., concurring) ("arguments, consultations and decisions . . . not central to the process" implicate no First Amendment rights).

[25] Citing *Brown* v. *Hartlage*, 456 U.S. 45, 53-54 (1983); *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 101-03 (1979); *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

required where, as here, an accused *demands* an open proceeding and objects to closure. See *Douglas* v. *Wainwright*, 714 F.2d 1532, 1539 (11th Cir. 1983), *cross-petitions for certiorari filed*, Nos. 83-817 & 83-995.[26]

No such showing was made, or could have been made, to justify the closure order entered below.

The sole basis for the closure order in this case was the State's conclusory assertion that it "must" use "evidence derived from court-authorized electronic surveillance," which might "involve" the "privacy expectations" of non-defendants, in order to "validate" the seizure of other evidence that the State proposed to use. (J.A.6a.) Both the State and the trial court expressed the belief that disclosure of such evidence for this purpose in open suppression proceedings would constitute an "unnecessary publication" and "an unlawful invasion of privacy" which would render the evidence inadmissible under the Georgia RICO statute, O.C.G.A. § 16-1164(b)(8), in criminal prosecutions of persons other than those on trial.[27]

On appeal, the Georgia Supreme Court declined to reach the question of whether the Georgia RICO statute "required that the wiretap information be revealed only in a closed courtroom." (J.A.23a, 303 S.E.2d at 441.)[28] Instead, the

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[26] At least where, as here, a contemporaneous objection is made, closure may not be effected in the absence of a hearing on the issue and findings articulated in the record by the trial court as to the need for closure, the lack of less restrictive alternatives, and the efficacy of closure. *Gannett, supra*, 443 U.S. at 445-46 (Blackmun, J., concurring in part and dissenting in part); *id.* at 400-01 (Powell, J., concurring); *United States* v. *Brooklier*, 685 F.2d 1162, 1171 (9th Cir. 1982); *United States* v. *Criden*, 675 F.2d 550, 559-62 (3d Cir. 1982). *Cf. United States* v. *Chagra*, 701 F.2d 354, 364-65 (5th Cir. 1983). The failure of the trial judge to make and articulate any of the requisite findings constitutes an independent ground for reversal.

[27] O.C.G.A. § 16-11-64(b)(8) is set out at page 6, note 6, above.

[28] The fact that, as a matter of state law, the prosecution would be disabled from later using wiretap evidence in open court against the defendants, or against others not presently on trial, would not by itself give rise to a state "interest" justifying closure, for a state law precluding the use of such evidence unless played in closed proceedings would itself have to be measured against the Constitution's guarantees of openness. Whether state law so provides in Georgia is an issue not decided by the Georgia Supreme Court and is not before this Court.

appellate court concluded that the trial court had permissibly "balanced" the "privacy rights of others" against petitioners' "rights to a public hearing." (*Id.*) But whatever privacy interests were conceivably at stake here, they could not justify closure of this suppression hearing.

First, whether or not closure may *ever* be required to protect the privacy interests of other parties, such privacy interests could not possibly extend *beyond* those portions of the proceeding devoted to revealing the contents of the wiretap information. See, *e.g.*, *Cianfrani, supra,* 573 F.2d at 857. Yet the trial court in this case did not simply close the courtroom for the two-and-one-half hours during which the State's tapes were played; the entire seven-day suppression hearing was closed. There cannot be any doubt that total closure was unjustified.

Second, assuming that the State's request to use its evidence implicated substantial privacy interests, and that partial closure might thus have been warranted, the issue was whether, *on the facts of this case,* whatever infringement of privacy was threatened by the playing of recorded conversations in open court at the suppression hearing was serious enough to override the right to open proceedings. The trial court's closure order, however, amounts to a flat rule that, in a suppression hearing, privacy interests must *always* prevail.

Such *per se* rules are virtually never permissible in this context; this Court in *Globe Newspaper, supra,* made clear that closure requests should be "determine[d] on a case-by-case basis." 457 U.S. at 609. Thus, at a minimum, the trial court should be required to make an assessment of the weight of the privacy interests at stake in a given case, based on such factors as the nature of the recorded conversations, the willingness of the parties to the conversations to consent to the disclosure of the contents, and the degree to which the recordings have

already been—or will be—lawfully disseminated. The trial court should also be required to consider alternatives to closure.[29]

The trial court here acted only on the State's cryptic claim that the intercepted conversations might "involve" "privacy expectations" of others—hardly a sufficient showing—and made no particularized finding of justification or necessity. Nor could the required finding of efficacy have been made here in any event, for transcripts of the suppression hearing—including transcripts of the tapes played by the State—were themselves made public. See *Globe Newspaper, supra,* 457 U.S. at 610.

The Georgia Supreme Court apparently perceived two additional interests at stake that justified closure—"harm to others" and "prejudice to other defendants" (J.A.23a, 303 S.E.2d at 441)—but the trial court identified no such interests as justifications for closure *in this case,* and the appellate court did not specify what it had in mind. The Georgia Supreme Court purported to discern "harm" and "prejudice" to others in the evidence "revealed" at the suppression hearing. It was, of course, improper to assess the constitutionality of the closure order on the basis of what transpired *after* the order was issued, rather than on the record before the trial court when it ruled. Even if the possibility of such injury had been asserted *before* closure, a vague and unsupported assertion that unidentified persons might in some unspecified fashion be "harmed" or "prejudiced" could not without more constitute a sufficient justification for closure. There was no evidence before the trial court indicating that failure to close the suppression hearing would in fact cause any such injuries.

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[29] It has been suggested that, where public disclosure is to be avoided, trial courts use headphones to listen to the tapes or secure prehearing agreements to limit the references to the actual contents of any private communications. See *Gannett, supra,* 443 U.S. at 445 (Blackmun, J., concurring in part and dissenting in part); *Cianfrani, supra,* 573 F.2d at 858-59 (discussing "wide variety" of alternatives even to limited closure). Indeed, a trial court has considerable discretion in deciding whether to permit the use of such evidence at all, and may exclude evidence upon determining that it is purely cumulative, or unduly prejudicial to the accused.

C. Closure of the Suppression Hearing also Violated the First Amendment.

Although primary reliance has been placed here on the Sixth Amendment public trial right, the closure order issued by the trial court also clearly violated the First Amendment. The considerations justifying open suppression hearings under the Sixth Amendment also justify openness under the First Amendment. See, *e.g., Globe Newspaper, supra,* 457 U.S. at 603-606; *Richmond Newspapers, supra,* 448 U.S. at 564-78 (opinion of Burger, C.J.); *Gannett, supra,* 443 U.S. at 397-401 (Powell, J., concurring). [30]

Petitioners' own First Amendment rights were denied because closure precluded them from availing themselves of the "important educative role" that open judicial proceedings can serve, *Gannett, supra,* 443 U.S. at 428 (Blackmun, J., concurring in part and dissenting in part)—that is, from creating public awareness of their own plight, and of the egregious law enforcement practices used here.

Moreover, in protesting closure, petitioners assert not only their own rights but those of the public, whose right of access is indisputably implicated. Petitioners have standing to assert the public's First Amendment right of access because, at least in some cases, no representatives of the public may be aware of—or, for any number of reasons, willing to challenge [31]—an attempt to close the proceedings. Thus, the accused may be the only available champion of the public's right to open suppression hearings. See, *e.g., Doe* v. *Bolton,* 410 U.S. 179, 188-89 (1973); *Griswold* v. *Connecticut,* 381 U.S. 479, 481 (1965). Cf. *NAACP* v. *Alabama ex rel. Patterson,* 357 U.S. 449, 459 (1958).

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[30] State and lower federal courts have applied the First Amendment to bar closure of suppression hearings in a wide number of cases. See, *e.g., Brooklier, supra,* 685 F.2d at 1171; *Criden, supra,* 675 F.2d at 559-62; *United States* v. *Edwards,* 430 A.2d 1321 (D.C. Ct. App. 1981), *cert. denied,* 455 U.S. 1022 (1982); *Richmond Newspapers, Inc.* v. *Commonwealth,* 22 Va. 574, 281 S.E.2d 915 (1981); *Buzbee* v. *Journal Newspapers, Inc.,* 297 Md. 68, 465 A.2d 426 (1983). See also *Chagra, supra,* 701 F.2d at 364-65.

[31] The closure of the suppression hearing in this case was in fact protested by Atlanta Newspapers, Inc., although the paper did not appeal the closure order.

II. The Evidence on Which Petitioners' Convictions Were Based Should Have Been Suppressed Because the General Search Undertaken of Their Homes, and the Wholesale Seizure of Their Property and Papers, Without Particularized Warrant or Probable Cause, Violated the Fourth Amendment.

A. The Statute Is Unconstitutional on Its Face.

The record in this case makes clear that at least some of the property was seized by the police on the view that such seizures were authorized by O.C.G.A. § 16-14-7(f), and *not* by the warrants.[32] Section 16-14-7(f) provides that property may be seized without prior judicial approval where (1) the police have "probable cause to believe the property is subject to forfeiture"; (2) the seizure is "incident to a lawful arrest, search, or inspection"; and (3) "the officer has probable cause to believe the property . . . will be lost or destroyed if not seized." Section 16-14-7(f) is facially invalid both because the definition of "property subject to forfeiture" is, on its face and as construed, so broad as to empty the "probable cause" requirement of all meaning, and because, even if the definition of forfeitable property enabled the police to identify it on mere observation, the State is forbidden to authorize seizure of

[32] See T.600 (testimony of State's witness that seizure of "personal and private records" was made "under the R.I.C.O. statute," and "not . . . the order."). See also T.879, 881-82 (describing post-raid seizure of petitioner W.B. Burke's car "under the R.I.C.O. statute," in absence of warrant or seizure order).

The trial court's refusal to pass on the validity of the search warrants and the lawfulness of the searches and seizures pursuant thereto must be treated as a determination that Section 16-14-7(f) authorizes warrantless entry into a person's home, an indiscriminate search of the premises, and wholesale seizures of private property. As noted above, the Georgia Supreme Court held that seizures under Section 16-147(f) must be incident to a *lawful* arrest, search, or "inspection"; it did not, however, reverse the convictions of the petitioners with directions to the trial court to assess the validity of the search warrants and the lawfulness of the seizures made pursuant thereto. Accordingly, even if the Court rejects the particularity and probable cause arguments petitioners raise here, the judgments below must nonetheless be vacated to permit assessment of petitioners' challenge, not passed on by the courts below, that the warrants, the entry, and any seizures pursuant to the warrants, were—even apart from those pursuant to the RICO statute—invalid.

lawfully held property without prior judicial approval and without notice or hearing.

Under Georgia Code § 16-14-7(a), "[a]ll property of every kind used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity is subject to forfeiture to the state." As one federal district court has recognized, that definition includes at least "all property, of whatever nature and no matter how inoffensive, if it is acquired with racketeering proceeds." *Western Business Systems, Inc.* v. *Slaton,* 492 F. Supp. 513, 514 (N.D. Ga. 1980). Such property "might be anything from gardening equipment to cook books." *Id.*[33] The wholesale seizures that occurred in this case in anticipation of criminal proceedings and parallel civil forfeiture actions—where the police, in the words of the trial court, "just went in and took everything in sight" (S.T.638)—vividly illustrate the scope of authority to seize private property that the police understand Section 16-14-7(f) to confer.

Because "property subject to forfeiture"—*e.g.,* property acquired with racketeering proceeds—could literally include *anything,* police are simply incapable of making "probable cause" determinations sufficiently meaningful to justify seizure of property without prior judicial approval. The "probable cause" required by the Fourth Amendment is " 'probable cause to *associate* the property with criminal activity.' " *Texas* v. *Brown,* 103 S. Ct. 1535, 1540 (1983) (plurality opinion of Rehnquist, J.) (emphasis added).[34] As Justice Rehnquist has observed, probable cause "requires that the facts available to the officer . . . 'warrant a man of reasonable caution in the belief,' . . . that [the items sought to be seized] may be contraband or stolen property or useful as evidence of a crime."

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[33] Cf. *Russello* v. *United States,* 104 S. Ct. 296, 299-303 (1983) (broadly construing illegal "interest" under federal RICO statute, 18 U.S.C. § 1963(a)(1), to include fire insurance payments for arson damage to property caused by conduct of petitioner in violation of RICO). Under the federal RICO statute, property subject to forfeiture may not be seized prior to conviction, although a court may enjoin its disposition or use pending the outcome of forfeiture proceedings. See 18 U.S.C. §§ 1963(b) & (c), 1964(a).

[34] Quoting *Payton* v. *New York,* 445 U.S. 573, 586-87 (1980).

Id. at 1543.[35] "There must," this Court has made clear, "be a *nexus* . . . between the item to be seized and *criminal* behavior." *Warden* v. *Hayden*, 387 U.S. 294, 307 (1967) (emphasis added).[36]

The property authorized to be seized by Section 16-14-7(f) has no "distinctive character" that could support such a belief or disclose such a nexus, much less a character that speaks "volumes . . . to the trained eye of the officer." *Brown, supra*, 103 S. Ct. at 1543 (plurality opinion).[37] In contrast to such property as the uninflated, tied-off balloons at issue in *Brown*, there is nothing "clearly . . . incriminating" about "property subject to forfeiture," see *Washington* v. *Chrisman*, 455 U.S. 1, 6 (1982),[38] and an officer's identification of particular property as "subject to forfeiture" is therefore bound to be "mere speculation." *United States* v. *White*, 660 F.2d 1178, 1182 (7th Cir. 1981). Unless the property bears some legend explicitly identifying it as having been acquired through proceeds from "a pattern of racketeering activity," a police officer simply could not have "probable cause to suspect that the item is connected with criminal activity." *Illinois* v. *Andreas*, 103 S.Ct. 3319, 3324 (1983). Section 16-14-7(f)'s probable cause proviso is therefore nothing more than "a teasing illusion," *Edwards* v. *California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring), a purely nominal protection helpless to safeguard against wholesale seizures of the sort that occurred here.

Interposition of the judicial process is required to ensure that there is probable cause to believe that the property sought to be seized *is* " subject to forfeiture," and that it is located at the place to be searched. Both findings are critical to implement the central Fourth Amendment requirement that items to be seized be particularly described in order to limit the exercise of discretion by police officers. See *Stanford* v. *Texas*, 379 U.S.

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[35] Quoting *Carroll* v. *United States*, 267 U.S. 132, 162 (1925).

[36] See also *Ybarra* v. *Illinois*, 444 U.S. 85 (1979) (no automatic "probable cause" nexus between bar patrons and bar for which probable cause warrant had issued).

[37] See *id.* at 1545 (Powell, J., concurring in judgment).

[38] Citing *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *Harris* v. *United States*, 390 U.S. 234 (1968).

at 485-86.[39] Because Section 16-14-7(f) places virtually no limit on the type of property that an officer might believe is "subject to forfeiture" (contrast *Andresen* v. *Maryland*, 427 U.S. 463, 480-81 (1976)), it is constitutionally imperative to interpose a magistrate's determination, based on *genuine* probable cause, to assure that seizures under Georgia's RICO statute are not the wholesale seizures condemned by the Framers.[40]

Even if "property subject to forfeiture" were self-revealing, without prior judicial approval the State may not, under the Fourth Amendment, seize property lawfully held—property that is neither stolen nor the fruit, instrumentality, or evidence of a crime. What Georgia has attempted to do here is impermissible —to expand the categories of property subject to seizure without warrant beyond those established by this Court: The State here has authorized property to be seized without a constitutionally sufficient "nexus" to criminal behavior. *Warden* v. *Hayden, supra*, 387 U.S. at 307. Little would remain of the Fourth Amendment's protections if any property that might have been purchased with ill-gotten gains could be seized without prior judicial approval as "fruit" or "evidence" of the crime.

Seizure without notice or hearing of lawfully held property that is neither the fruit, instrumentality, nor evidence of a crime would violate not only the Fourth Amendment but due process

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[39] This case is unlike those involving searches under warrants for certain stolen property that is not self-revealing, or warrantless seizures under the "plain view" doctrine for property that an officer has probable cause to believe is stolen. Probable cause for seizure exists with respect to such property either when the police know that particular property has been stolen, or when police come upon property that *must* have been stolen because such property obviously does not belong where it is found. The fact that such property may, by itself, be innocent does not save it from seizure not simply because it is unlawfully held but because there is independent reason to associate it with criminal activity. In each case, something about the particular item of property links it to a crime. Nothing about "property subject to forfeiture" on the face of it reveals any such connection.

[40] See *Stanford* v. *Texas, supra*, 379 U.S. at 481-85. The origin and meaning of the particularity requirement is described at length in the brief of the American Civil Liberties Union as *amicus curiae* in *Ins* v. *Delgado*, No. 82-1271, at pp. 13-22.

as well. This case does not present "an 'extraordinary situation' [justifying] postponement of notice and hearing until after seizure." *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 680 (1974) (indicating that, absent "extraordinary situation," notice and hearing is required for seizure even of property used for unlawful purposes). In conducting wholesale seizures of petitioners' property, the police had no basis for determining here that "pre-seizure notice and hearing might frustrate the interests served by the statute[ ]." *Id.* at 679. The police had no basis for believing that any of the "property subject to forfeiture" "[w]ould be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given."[41] *Id.* Thus, "[b]ecause the official seizures [were] carried out without notice or hearing or other safeguard against mistaken [seizure]," they violated the Fourteenth Amendment. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 606 (1975). For all of these reasons, the statute is invalid on its face.

B. The Seizures Below Violated the Fourth Amendment.

Wholly apart from the issue of their validity under Section 16-14-7(f), the seizures here must be tested directly against the Fourth Amendment. See, *e.g.*, *Ybarra* v. *Illinois*, 444 U.S. 85 (1979); *Stanford* v. *Texas*, 379 U.S. 476 (1965). So measured, they plainly fail to pass constitutional muster; it is clear that no valid warrant could have authorized the general searches and wholesale seizures performed below. A warrant describing everything in a house would be precisely the general warrant that the Fourth Amendment was designed to prevent. See *Entick* v. *Carrington*, [1765] St. Tr. 1030.[42]

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[41] See also *United States* v. *Eight Thousand Eight Hundred & Fifty Dollars*, 103 S. Ct. 2005, 2011 n.12 (1983) (reaffirming test of *Calero-Toledo*); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300 (1981) (exception to requirement for hearing may be justified in "emergency situations").

[42] Petitioners, who in the trial court had attacked the validity of the warrants, and the searches and seizures performed thereunder, renewed their attack in the Georgia Supreme Court, asserting that the warrants had been executed in bad faith, as part of "a pre-search plan to search for and seize anything that the executing officers, in their sole and unbridled discretion, felt

(footnote continues)

C. All of the Evidence Seized Should Have Been Suppressed.

Under this Court's decision in *Stanford* v. *Texas*, 379 U.S. 476 (1965), it is irrelevant in determining the validity of a search and seizure that *some* of the items seized were described in the warrant with sufficient particularity, if the warrant "was of the kind which it was the purpose of the Fourth Amendment to forbid—a general warrant." *Id.* at 480. By the same token, the fact that a warrant, on its face, satisfies the Fourth Amendment's particularity requirement can make no difference on a motion to suppress if the police have *treated* the warrant —or statute—as license for a general search of a person's home and wholesale seizure of his papers and effects. This is so especially when among the things seized are, as here, the most personal and confidential communications of the victims of the searches.

In such circumstances, the proper remedy must be suppression of all property seized, including property within the literal scope of the warrant, as if the warrant itself had on its face authorized the general search. As several circuit courts have acknowledged, "flagrant disregard for the limitations in a warrant [may] transform an otherwise valid search into a general one, thereby requiring the entire fruits of the search to be suppressed." *United States* v. *Heldt*, 668 F.2d 1238, 1259 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926 (1982).[43] Application of such a rule is necessary where, as here, the record establishes that the police "did not confine their search in good faith to the objects of the warrant, and that while purporting to

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(footnote continued)

might be evidence of the targets' assets against which forfeiture actions might be brought." (Appellants' Response to Appellees' Jurisdictional Challenge, p. 3.) Petitioners made clear their position that the searches had been indiscriminate and the seizures wholesale, in defiance of basic Fourth Amendment guarantees. (*E.g.*, Brief of Appellants, p. 10.) These challenges, however—like those presented to the trial court—fell on deaf ears in the court below.

[43] See, *e.g.*, *United States* v. *Tamura*, 694 F.2d 591, 597 (9th Cir. 1983); *United States* v. *Wuagneux*, 683 F.2d 1343, 1354 (11th Cir. 1982), *cert. denied*, 104 S. Ct. 69 (1983).

execute it, they substantially exceeded any reasonable interpretation of its provisions." *United States* v. *Rettig*, 589 F.2d 418, 423 (9th Cir. 1978).[44]

Nothing short of blanket suppression will serve to deter—or adequately to redress—the Fourth Amendment violation worked when the police "use a seemingly precise warrant only as a ticket to get into a man's home, and, once inside, . . . launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant." *Stanley* v. *Georgia*, 394 U.S. 557, 572 (1969) (Stewart, J., concurring in result). Even assuming that the warrants here were otherwise valid, therefore, the entire fruit of the raids should have been suppressed.[45]

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[44] In *Rettig*, the Ninth Circuit held that, although the warrant issued by the state court judge there "was not a general warrant on its face," 589 F.2d at 418, "all evidence seized during the search must be suppressed." Writing for the court, Circuit Judge Kennedy explained that, "[a]s interpreted and executed by the agents, the warrant became an instrument for conducting a general search," and, "[u]nder the circumstances, it is not possible . . . to identify after the fact the discrete items of evidence which would have been discovered had the agents kept their search within the bounds of the warrant." *Id.*

[45] To hold that damage actions under 42 U.S.C. § 1983 would afford sufficient redress for such wholesale violations of Fourth Amendment and due process rights would sanction cynical pay-as-you-go law enforcement, in which the possibility of damages is deemed simply a "cost" of "fighting crime." Cf. *City of Los Angeles* v. *Lyons*, 103 S. Ct. 1660, 1683-84 (1983) (Marshall, J., dissenting). Moreover, such a remedy would be unlikely to afford full redress for the simple reason that *post hoc* inquiry into the reasonableness of a search and seizure is likely to be rather forgiving. See Stewart, "The Road to *Mapp* v. *Ohio* and Beyond," 83 *Colum. L. Rev.* 1365, 1386-89 (1983). See also *Torres* v. *Puerto Rico*, 442 U.S. 465, 474 (1979) ("[W]e have not dispensed with the fundamental Fourth Amendment prohibition against unreasonable searches and seizures simply because of a generalized urgency of law enforcement.").

CONCLUSION

For the foregoing reasons, the convictions of the petitioners should be reversed.

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Nos. 83-321 & 83-322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GUY WALLER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

CLARENCE COLE, *et al.*,

Petitioners,

v.

STATE OF GEORGIA,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1.

Did the trial court properly order the courtroom to be closed during the hearing on the motion to suppress based upon provisions of the Georgia statutes on electronic surveillance?

2.

Did the Supreme Court of Georgia properly conclude that O.C.G.A. § 16-14-7(f) is constitutional on its face?

3.

Did the Supreme Court of Georgia properly conclude that there was no requirement that all material seized in the search in question be suppressed?

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ON WRITS OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT

Pursuant to Rule 34 of the Rules of this Court, the Respondent in Nos. 83-321 and 83-322 respectfully submits this joint brief.

OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at 251 Ga. 124, 303 S.E.2d 437 and appears as Appendix A of the joint appendix.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3). The judgment of the Supreme Court of Georgia was entered on June 1, 1983. Petitioners filed timely petitions for writs of certiorari which were granted on November 7, 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First, Fourth, Sixth and Fourteenth Amendments to the Constitution of the United States which are set forth in the joint appendix. This case also involves O.C.G.A. §§ 16-11-64(b)(8) and 16-14-7(a) and (f) which are set out in the joint appendix.

STATEMENT OF THE CASE

On February 9, 1982, the grand jury of Fulton County indicted the Petitioners in the two instant cases as well as numerous others on charges of violation of the Georgia Racketeer Influenced and Corrupt Organizations Act. All of the defendants entered pleas of not guilty to the charges.

On June 21, 1982, a trial commenced on the charges against the Petitioners and other defendants. At the conclusion of that trial, the Petitioners in the instant cases were found guilty of commercial gambling and communicating gambling information. Petitioner Eula Burke was sentenced to five years probation, and a $10,000 fine on one charge with a twelve month probated sentence on another charge. (R. 201, 209-210). Petitioner W. B. Burke was sentenced to five years with two years to serve and a $15,000 fine with a twelve month probated sentence being imposed on a separate charge. Petitioner Clarence

Cole was sentenced to five years with three years to serve and also received a twelve month probated sentence on a separate charge. Petitioner Thompson was sentenced to five years with two years to serve and a $10,000 fine, as well as a twelve month probated sentence on a separate charge. Petitioner Waller was sentenced to five years with three years to serve and the balance on probation and a $20,000 fine with a twelve month probated sentence being imposed on a separate charge. (R. 200, 207-8).

The facts of the case as presented at trial show that between June, 1981 and January, 1982, the Petitioners and others participated in a gambling organization which conducted a lottery based on the daily stock and bond volume on the New York Stock Exchange. This lottery was conducted in the metropolitan Atlanta area. Gambling information was transmitted by electronic means and stored in a microcomputer maintained by Petitioner Clarence Cole.

Prior to trial Petitioners filed a motion to suppress evidence based on searches that were conducted prior to the indictments. On June 14, 1982, the state filed a motion to close the hearings on the motion to suppress. The state asserted that the hearing was going to involve evidence of a sensitive nature and that the litigation on the motion would of necessity involve the introduction of evidence which would affect individuals not on trial at that time and individuals not indicted at that time. A portion of the information which would be disclosed involved certain evidence obtained through the use of electronic surveillance. The state sought to close the hearing based on the prohibition on publication of wiretap evidence set forth in O.C.G.A. § 16-11-64(b)(8). In order to allow the

state to utilize the same information in subsequent prosecutions against other individuals and to protect the privacy rights of those not on trial, the state sought to close the motion hearings. The trial court concluded that if the evidence was going to be offered at the trial of other offenders, the presentation of the evidence at the hearing on the motion to suppress in the instant cases would amount to publication and would taint the evidence under the Georgia statute. (S.T. 6-8).

When the requests were made, Attorney Charles Smith, counsel for Petitioner Clarence Cole and other defendants, agreed with the observation made by the state and concurred with the request, insofar as the request extended only to the hearings on the motion to suppress.[1] Attorney Herbert Shafer, representing the remainder of the defendants at that time, opposed the closure motion and asserted that he would insist on the right to an open trial. (S.T. 11).

The trial court granted the motion to close the proceedings only as to the hearing on the motion to suppress. Attorney Shafer sought to have certain individuals remain in the courtroom, but the trial court ruled that the statute was very specific, "[a]nd I think that means everybody must go except the defendants, counsel, necessary witnesses of course who appear, and the officers of the court." (S.T. 14). Attorney Smith interposed an objection to Attorney Shafer's wife remaining in the courtroom, although the state did not oppose such request. The trial court then granted the motion to close the proceedings and excluded all individuals except those previously enumerated by the court.

[1] Respondent would urge that Petitioner Cole is precluded from asserting the issue challenging the closure of this hearing as his counsel did concur with the closure motion at the time it was made.

After the trial and convictions, the Petitioners filed a direct appeal to the Supreme Court of Georgia raising numerous allegations. In particular, the Petitioners challenged the closure of the courtroom and the constitutionality of O.C.G.A. § 16-14-7(f). That court affirmed the convictions and sentences, in particular, concluding that the code section being challenged was constitutional on its face and did not violate the Fourth Amendment. The court also concluded that there was no requirement that the evidence that had been lawfully seized be suppressed. The court concluded that the Sixth Amendment right to a public trial was not violated by the closure of the courtroom, noting that the trial court exercised its inherent power to preserve order in the courtroom, to protect the rights of parties and witnesses and to further the administration of justice. *Waller v. State*, 251 Ga. 124, 303 S.E.2d 437, 441 (1983). The motion for rehearing was denied by that court on June 18, 1983. Petitioner then filed two separate petitions for writs of certiorari in this Court requesting that this Court review the decision by the Supreme Court of Georgia. On November 7, 1983, this Court granted the petitions for writs of certiorari and consolidated the two cases.

SUMMARY OF THE ARGUMENT

Under the facts of the instant case, the trial court's closure of the courtroom during the hearing on the motion to suppress did not violate Petitioners' right to a public trial. The closure was limited solely to the motion to suppress hearing which is a pretrial proceeding and not a part of the actual trial itself and specifically did not apply the ruling to the jury trial portion of the proceedings. The state had compelling interests, which were justifiable under the circumstances, in having the courtroom closed based on the statutory requirement that evidence obtained as a result of electronic surveillance not be subject to publication. In order to allow the state to seek subsequent prosecutions or indictments, it was necessary to close the courtroom to prevent a possible publication of such material. Such closure also served to protect the privacy rights of those individuals not then on trial or not under indictment at the time of the hearing. The trial court was within its authority to preserve order and decorum in the courtroom and to protect the rights of the parties involved in the case. Thus, the right of the Petitioners to a public trial was properly balanced against the state's overriding concerns regarding the wiretap evidence. Furthermore, closure was properly limited so that only the motion to suppress hearing was closed. Therefore, the instant closure did not constitute a violation of the right to a public trial.

The provisions of O.C.G.A. § 16-14-7(f) do not violate the Fourth Amendment to the United States Constitution. The statutory provision provides for forfeiture under certain circumstances. The statute provides for restrictions which brings the statute within the parameters of the Fourth Amendment by requiring that the seizure be

made pursuant to a lawful arrest, search or inspection and also by requiring that the law enforcement officer have probable cause to believe that the property in question is subject to forfeiture. Thus, by definition the statute complies with the Fourth Amendment.

There was no requirement that the evidence not suppressed be excluded at the time of trial. The search in question was not a general search as suggested by the Petitioners, but was made pursuant to valid statutory procedures and a valid warrant. The mere fact that officers may have seized evidence which was subsequently returned to the Petitioners does not render the entire search and all evidence seized pursuant to that search inadmissible and subject to the exclusionary rule. No such wholesale application of the exclusionary rule should be made in instances in which officers act pursuant to valid warrants.

ARGUMENT

I. THE TRIAL COURT PROPERLY CLOSED THE COURTROOM DURING THE HEARING ON THE MOTION TO SUPPRESS PRIOR TO TRIAL.

The first issue presented for review by this Court is a challenge by the Petitioners to the trial court's closure of the courtroom during the hearing on the motion to suppress. Petitioners have asserted that the closure by the trial court violated their right to a public trial under the Sixth Amendment to the United States Constitution.

At the beginning of the hearing on the motion to suppress, the state reasserted the former motion previously made for closure, stating that it would be necessary during the hearing on the motion to utilize evidence which

could involve a reasonable expectation of privacy on the part of persons who were not presently on trial. The motion was specifically made based on the provisions of O.C.G.A. § 16-11-64(b)(8) concerning publication of wiretap information and subsequent use of that information in other prosecutions. That code section specifically provides the following:

> Any publication of the information or evidence obtained under a warrant issued hereunder other than that necessary and essential to the preparation of and actual prosecution for the crime specified in the warrant shall be an unlawful invasion of privacy under this part and shall cause such evidence and information to be inadmissible in any criminal prosecution.

Id. The state asserted that the evidence to be presented could affect persons other than the defendants on trial and could involve some persons who had not even been indicted. The trial court concluded that the presentation of such evidence would amount to publication under the statute.

Attorney Smith, representing Petitioner Clarence Cole concurred with the request insofar as it extended to the motion to suppress. Attorney Shafer opposed the motion, particularly stating that he felt that there had already been unnecessary publication of the material. The court concluded that the actual trial of the case would present a different set of circumstances, but as the request was only to the motion hearing, it would be granted. Attorney Shafer requested that other persons be allowed to remain in the courtroom to assist him, to which Attorney Smith interposed an objection. The court ruled that the courtroom would be closed during the hearing on the motion to suppress so as to exclude all others except witnesses,

necessary court personnel, the parties and their lawyers. (S.T. 12).

The testimony at the hearing on the motion to suppress focused on the electronic surveillance that was conducted. Various persons testified concerning the obtaining of the warrants to conduct the electronic surveillance and various officers testified concerning the procedures that were utilized when monitoring telephone calls. Certain tapes of telephone calls that were obtained by way of wiretaps were played at the hearing on the motion to suppress.

On direct appeal, the Supreme Court of Georgia considered the allegations challenging the closing of the courtroom. The court concluded the following:

> In the hearing here, information was revealed which was potentially harmful to others, would tend to violate the privacy of others, and might prejudice other potential defendants. Under these circumstances, the court balanced [Petitioners'] rights to a public hearing on the motion against the privacy rights of others and closed the hearing. The court exercised its inherent power ". . . to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice." *Lowe v. State*, 141 Ga. App. 433, 435, 233 S.E.2d 807 (1977). We find that [Petitioners'] Sixth Amendment right to a public trial was not violated. There is some question whether state or federal law would have required that the wiretap information be revealed only in a closed courtroom. OCGA § 16-11-64(b)(8) (Code Ann. § 26-3004); 18 U.S.C.A. § 2517. We need not reach this question since the thrust of [Petitioners'] argument is that the court failed to follow the procedure announced in *R. W. Page Corp. v. Lumpkin*, supra. This argument has no merit since the hearing in question occurred before

> that case was decided and before the procedural requirements set forth took effect.

Waller v. State, *supra*, 303 S.E.2d at 441.

The Sixth Amendment to the United States Constitution provides for an accused's right to a public trial. This right has been construed by numerous courts on many occasions. This Court has stated the following:

> Essentially, the public trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings (cite omitted). A fair trial is the objective, and "public trial" is an institutional safeguard for obtaining it.
>
> Thus, the right of "public trial" is not one belonging to the public, but one belonging to the accused, and inhering in the institutional process by which justice is administered. Obviously, the public-trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are not available seats. The guarantee will already have been met, for the "public" will be present in the form of those persons who did gain admission. Even the actual presence of the public is not guaranteed. A public trial implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process.

Estes v. Texas, 381 U.S. 532, 588-89 (1965) (Harlan, J., concurring).

It has been recognized by the courts that the Sixth Amendment reflects traditional distrust for secret trials and is an expression of the belief that the "knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on

possible abuse of judicial power." *In Re Oliver*, 333 U.S. 257, 270 (1948) (Footnote omitted).

The right to a public trial has been applied to various phases of the trial process itself. In *United States ex rel. Bennett v. Rundle*, 419 F.2d 599 (3d Cir. 1969), the court applied the right to a public trial to a *Jackson v. Denno* hearing, concluding that such a hearing was part of the trial and was held after the jury had been sequestered; therefore, the procedures fell within the constitutional guarantee to a public trial. The right to a public trial has been applied to contempt proceedings, even though they are considered to be summary in nature. *In Re Oliver, supra.* Recently, this Court has applied the right to a public trial to voir dire proceedings. *Press-Enterprise Co. v. Superior Court*, 34 Cr.L. 3019, decided January 18, 1984.

The Second Circuit Court of Appeals has applied the right to a public trial to a suppression hearing when the defendant and the public were excluded from the entire suppression hearing. *United States v. Clark*, 475 F.2d 240 (2d Cir. 1973). Chief Justice Burger, however, has noted, "[b]y definition, a hearing on a motion to suppress evidence is not a trial; it is a pretrial hearing." *Gannett Co. v. DePasquale*, 443 U.S. 368, 394 (1979) (Burger, C.J., concurring). In that same concurrence, Chief Justice Burger noted that at common law the courts recognized that the timing of a proceeding was likely to be critical. "To make public the evidence developed in a motion to suppress evidence, . . . would, so long as the exclusionary rule is not modified, introduce a new dimension to the problem of conducting fair trials." *Id.* at 395. Therefore, the fact that the closure in the instant case occurred at a hearing on a motion to suppress is at least a factor to be considered

in determining whether there has been a denial of the right to a public trial.

The right to a public trial has been held not to be limitless by various courts. *Lacaze v. United States*, 391 F.2d 516 (5th Cir. 1968). The Second Circuit Court of Appeals has recognized that the constitutional right to a public trial is subject to the court's power to preserve fairness and orderliness of the proceedings of the court. *United States ex rel. Bruno v. Herold*, 368 F.2d 187 (2d Cir. 1966). It has also been recognized that the right is not absolute and the trial court may in its discretion exclude the public for a part or all of the criminal proceedings where it is necessary to preserve order, protect witnesses or maintain confidentiality of certain information. *Boyd v. LeFevre*, 519 F.Supp. 629 (E.D.N.Y. 1981).

Recently this Court has examined the right to a public trial from a First Amendment perspective and held, "closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." *Press-Enterprise Co., supra*, 34 Cr.L. at 3021. The Court also went on to note the following:

> We have previously noted that in some limited circumstances, closure may be warranted. Thus a trial judge may, "in the interest of the fair administration of justice, impose reasonable limitations on access to a trial."

Id. at 3022 n. 10, quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n. 18.

The cases teach us that in order to make a complete evaluation of an allegation concerning the denial of a right to a public trial, it is first necessary to examine the underlying purposes for this right. The Sixth Amendment

public trial provision is derived from a common law policy in favor of public proceedings. An initial common law purpose for the public trial right was to curb a secret bias or partiality on the part of a judge. 3 W. Blackstone, *Commentaries* * 372. Later authorities noted that publicity would discourage witnesses from perjury and also might assist in developing persons who otherwise might not know that they possessed information relevant to the trial. 6 J. Wigmore, *Evidence in Trials at Common Law* § 1834 at 435 (Chadbourne Rev. 1976). *See also United States v. Cianfrani*, 573 F.2d 835, 848 (3d Cir. 1978).

This Court in *Gannett Co., supra*, specifically reviewed the interests protected by the public trial right:

> Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system.

Id. at 383. Other courts have noted that the right provides protection from secret proceedings, assists in the likelihood that more truthful testimony would result and serves to give notice to the world of details of the case. *Douglas v. Wainwright*, 521 F.Supp. 790, 795 (M.D. Fla. 1981). Therefore, there are strong societal interests in public trials; however, there are strong societal interests in other constitutional guarantees as well. *Gannett Co., supra* at 383.

In evaluating a particular case, it is essential to consider whether the procedure in question meets the purposes of the guarantee to the right to a public trial. "In particular the court must analyze, in light of those purposes of the public trial guarantee which the defendant

alleges were undermined . . . the scope and practical impact of the partial closure . . . and the strength of the reason for the closure." *Douglas v. Wainwright*, 714 F.2d 1532, 1540 (11th Cir. 1983). Thus, whether a particular proceeding is sufficiently "public" to meet constitutional standards, turns on the particular circumstances of the case. *Aaron v. Capps*, 507 F.2d 685, 687 (5th Cir. 1975). "[A]lthough the Constitutional right of public trial is a substantial one, the term 'public' is a relative one, and its construction depends upon various conditions and circumstances. . . ." *Douglas v. Wainwright, supra* at 1540 n. 5, quoting *United States v. Geise*, 158 F.Supp. 821, 824 (D. Alaska 1958). Thus, this Court must consider the circumstances in the instant case, including the purposes of the right to a public trial and the specific reasons for closure in the instant case.

Courts have recognized governmental interests in closure of proceedings under various circumstances. It has been recognized that states and the government have interests to protect as well as do individuals. In *United States ex rel. Bennett v. Rundle, supra*, the court recognized that the state was free to regulate the procedures of its courts in accordance with its own conception of policy and fairness. *Id.* at 613, citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). The Second Circuit Court of Appeals has recognized the government's interests in protecting a hijacker profile from disclosure. Thus, in *United States v. Bell*, 464 F.2d 667 (2d Cir. 1972), the court upheld the exclusion of the defendant and the public from a limited portion of a suppression hearing. The court found that the protection of the air traveling public was a sufficient justification for the limited exclusion of the public from that portion of the trial.

In *United States v. Hernandez*, 608 F.2d 741 (9th Cir. 1979), the government requested that spectators be excluded during the testimony of an informant. The request was based on concerns of danger to the witness and his family. The request was granted over the defendant's objection. The Ninth Circuit Court of Appeals concluded that the exclusionary order was appropriate under the circumstances, noting that the right to a public trial did not preclude a limited exclusion when there was a demonstrated need to protect a witness. The court also noted that the right to a public trial was subject to the trial court's power to keep order in the courtroom. The court expressed a concern that there be an accommodation of the individual's right to a public trial and the societal interest that might justify the closing of the courtroom to the public. *Id.* at 747.

Other courts have recognized the government's interest in protecting witnesses as sufficient to justify closure. In *Castillo v. Harris*, 491 F.Supp. 33 (S.D. N.Y. 1980), the courtroom was sealed during the testimony of an undercover police officer who was still actively engaged in undercover activities. Under those circumstances, the court found a sufficient justification presented on behalf of the state for the closure in question. In *Boyd v. LeFevre*, *supra*, the court recognized that the right to a public trial was not absolute and found that if necessary to preserve order, protect witnesses or maintain the confidentiality of certain information, closure might be justified.

The Eighth Circuit Court of Appeals held that privacy of others was also a concern which might justify closure under certain circumstances. The case involved wiretap and electronic surveillence evidence. The court concluded that the protection of privacy was an overriding con-

gressional concern under those circumstances. *In Re Application of Kansas City Star*, 666 F.2d 1168 (8th Cir. 1981).

Finally, this Court has addressed the public trial right in light of the First Amendment guarantees on numerous occasions. In *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539 (1976), the Court balanced the right of a trial by an impartial jury against public trial considerations. A similar analysis was conducted in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

A pertinent factor in the instant case is the type of evidence that was to be presented during the hearing on the motion to suppress. The state was concerned with evidence obtained as the result of electronic surveillance. This concern also has arisen in federal cases involving Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et. seq.* In *United States v. Cianfrani, supra*, the court was specifically concerned with the provisions of Title III concerning disclosure of information obtained through interceptions by way of electronic surveillance. The court noted that Title III was a statute designed to regulate the interception and disclosure of wire and oral communications. The Act has purposes of protecting the privacy of such communications and setting forth a uniform basis under which the interception of such communications could be authorized. *Id.* at 855. The legislative history of Title III makes it quite clear that "the protection of privacy was an overriding congressional concern" of the Act. *Gelbard v. United States*, 408 U.S. 41, 48 (1972).

Under Title III, there are strict provisions prohibiting the use of the contents of communications in trials or other proceedings if the disclosure would violate the Act.

In evaluating Title III in light of the circumstances of the case, the court in *United States v. Cianfrani* extensively examined the legislative history of the statute which "emphasizes the concern of its drafters that the Act preserve as much as could be preserved of the privacy of communications, consistent with the legitimate law enforcement need that the statute also sought to effectuate." *Id.* at 856. The court went on to note that Congress obviously intended to regulate strictly the disclosure of such communications, "limiting the public revelation of even interceptions obtained in accordance with the Act to certain narrowly defined circumstances." *Id.*

In examining the circumstances of that case, the Third Circuit Court of Appeals concluded that protection of the privacy of communications was vital to society.

> We depend upon the free interchange of ideas and information. And we are dedicated to the proposition that each individual should be free from unwarranted intrusion into his private affairs. Both these interests are threatened by modern techniques of electronic surveillance, however, since it is now possible to record surreptitiously the most intimate conversations and to preserve them for later disclosure. Only by governing strictly both authorization and disclosure of intercepted communications the Congress believe that such weighty interests could be protected adequately.
>
> We believe that the interest in protecting the privacy of communications is sufficiently weighty to justify some limitations in certain circumstances on the general right of access to court proceedings. And we believe that the circumstances of this case present the required strict and compelling necessity to justify a limitation on public access to the hearing held below. Only by allowing such limitations can we effectuate the congressional concerns evident in Title

III and preserve the strength of that statute's provisions governing disclosure.

United States v. Cianfrani, supra, 573 F.2d at 856-7. Thus, the court found a limited exception to the right of public access which the court concluded was required under the Act.

The Eighth Circuit Court of Appeals has also addressed the question of public access to wiretap and electronic surveillance information. That court noted that Title III had a dual purpose of "protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which interception of wire and oral communications may be authorized." *In Re Application of Kansas City Star, supra,* 666 F.2d at 1174. The court found that the government's investigation and the protection of privacy were overriding congressional concerns under Title III. The court then concluded that under the circumstances, the privacy of others should not be unduly invaded. *Id.* at 1175.

The Seventh Circuit Court of Appeals also considered wiretap information in *United States v. Dorfman,* 690 F.2d 1230 (7th Cir. 1982). The defendants were charged with various federal crimes and the government had been engaged in wideranging wiretaps. A motion to suppress was filed on behalf of the defendants and the district judge ordered that the exhibits be sealed. Various newspapers moved to have the exhibits unsealed. The judge sealed the exhibits to protect the defendants' right of privacy and the right to a fair trial. The court noted that the strict prohibition set forth against the disclosure of unlawfully obtained wiretap evidence would be undermined by disclosure of wiretap evidence at a suppression

hearing before the court ruled on its lawfulness. *Id.*

Thus, it can be seen that the courts have maintained consistently that while a defendant does have a right to a public trial, there may be certain circumstances under which the government's or state's interests may override the right to a public trial for limited purposes and for a limited period. Thus, the right of the state to protect the procedure of the courts, the confidentiality of informants, to protect witnesses and the privacy of others, have all been recognized by various courts as justification for at least partial closure. In particular, cases in which wiretap evidence is to be utilized have recognized a statutory obligation for closure under Title III.

In examining the circumstances in the instant case, Respondent asserts that the facts clearly justified the closure in question. The state had an interest in protecting the privacy of persons not on trial as well as protecting its ability to subsequently bring to trial those persons who had not been indicted or who were not presently on trial. Thus, the state was faced with the prohibitions of O.C.G.A. § 16-11-64(b)(8) on publication of wiretap information and the possibility that an open hearing on the motion to suppress could prevent future trials of individuals involved in the electronic surveillance. There was also the possibility of the unwarranted invasion of the privacy of others by the opening of the hearing on the motion to suppress. Clearly, the state statute has the same concerns as does the federal statute and as the concerns set forth in Title III of the Omnibus Crime Control and Safe Streets Act. An overriding concern is privacy of individuals not on trial and the unwarranted intrusion into that privacy by the unnecessary publication of electronic surveillance materials. Thus, the state

did have a justification for requesting the closure of the hearing on the motion to suppress.

The trial court had the obligation of balancing the privacy rights of others and the public trial right of the Petitioners in the instant case. As noted by the Supreme Court of Georgia, the trial court exercised its inherent power "to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice." *Waller v. State*, *supra* at 441 quoting *Lowe v. State*, 141 Ga. App. 433, 235, 233 S.E.2d 807 (1977). As the state did have an overriding societal concern in mind when requesting the closure, Respondent urges this Court to conclude that Petitioners' public trial right was not violated by the closure in the instant case.

Furthermore, the closure in the instant case was not unduly extensive. Although the trial court did close the entire hearing on the motion to suppress, the court specifically did not close any portion of the actual trial itself. Witnesses were available and testified at the trial of the case who had previously testified at the hearing on the motion to suppress. Therefore, all these witnesses were subject to public scrutiny when they testified and the purpose of inhibiting perjury was met by this later testimony. This later testimony also met the purpose of the public trial guarantee of discovering those persons who might have information about the case.

Respondent asserts that as the stated purposes behind the guarantee to a public trial were met in the instant case and because the state had an overriding concern in requesting the closure and, finally, because the trial court properly balanced the various concerns, the Petitioners' right to a public trial was not violated by the closure of

the hearing on the motion to suppress. Therefore, this Court should affirm the judgment of the Supreme Court of Georgia as to this issue.

II. THE SUPREME COURT OF GEORGIA PROPERLY CONCLUDED THAT O.C.G.A. § 16-14-7(f) DOES NOT VIOLATE THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND PROPERLY CONCLUDED THAT THERE IS NO REQUIREMENT THAT ALL EVIDENCE SEIZED BE SUPPRESSED.

A. FACIAL VALIDITY OF THE STATUTE.

Petitions in the instant case have challenged the provisions of O.C.G.A. § 16-14-7(f) setting forth the forfeiture provisions under the Georgia Racketeer Influenced and Corrupt Organizations Act. In particular, the statute provides the following:

> Seizure may be effected by a law enforcement officer authorized to enforce the penal laws of this state prior to the filing of the complaint and without a writ of seizure if the seizure is incident to a lawful arrest, search, or inspection and the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if not seized. Within ten days of the date of seizure, the seizure shall be reported by the officer to the district attorney of the circuit in which the seizure is effected; and the district attorney shall, within a reasonable time after receiving notice of seizure, file a complaint for forfeiture. The complaint shall state, in addition to the information required in subsection (e) of this Code section, the date and place of seizure.

O.C.G.A. § 16-14-7(f). Petitioners challenged this code

section, asserting that it is facially invalid.[2]

Respondent asserts that the statute in question fully complies with the requirements of the Fourth Amendment and that the search in question was proper and conformed to the Fourth Amendment requirements. The Supreme Court of Georgia considered the challenge to the facial validity of the statute and held the following:

> A seizure under this section is allowed only in carefully prescribed circumstances. The seizure must be incident to a lawful arrest, search or inspection, and the officer must have probable cause to believe that the property is subject to forfeiture or that the property will be lost or destroyed if not seized. There is no Fourth Amendment problem with the seizure of the fruits of a lawful search or inspection. The statute on its face provides that the search or inspection must be lawful. This requires that the search be pursuant to a warrant, incident to a lawful arrest, or in the presence of other exigent circumstances, which would render the search or inspection "lawful." By definition, therefore, the statute complies with the Fourth Amendment.

Waller v. State, supra, 303 S.E.2d at 440. The court went on to note that "seizure of contraband evidence, or weapons not listed on a search warrant by an officer executing an arrest warrant or search warrant does not

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[2] In the initial petitions for writs of certiorari filed before this Court, it was asserted by the Petitioners that the statute was facially invalid because it delegated unbridled discretion to police officers executing a search. At no time in the initial petitions was a challenge made to the validity of the search warrants themselves, nor was a complaint made concerning the trial court's failure to rule on the validity of the search warrants. Apparently, Petitioners now seek to raise additional challenges concerning the trial court's refusal and also concerning the definition of "property subject to forfeiture" in the statute. Respondent asserts that these are not proper issues for this Court to consider as they were not raised in the initial petitions.

violate the due process clause of the Fourth Amendment even though there has been no notice and hearing." *Id.*

The statute in question provides four conditions precedent to the seizure of property for RICO proceedings. The first requirement set forth in the statute is that the seizure be made by a law enforcement officer authorized to enforce the laws of this State. This provision clearly comports with the requirements of the Fourth Amendment.

The second requirement set forth in this statute is that the seizure be made incident to a lawful arrest, search or inspection. The designation of the search or inspection as "lawful" clearly complies with the Fourth Amendment requirements. Thus, before any seizure could be made under this statute, the officer must be proceeding under a lawful search warrant, be conducting a search pursuant to a lawful arrest or conducting a search authorized by certain exigent circumstances recognized by this Court as justifying a warrantless search. *See Chimel v. California*, 395 U.S. 752 (1969); *Warden v. Hayden*, 387 U.S. 294 (1967); *Payton v. New York*, 445 U.S. 573 (1980).

The third requirement set forth by the statute is that the officer have probable cause to believe that the property being seized is subject to forfeiture as provided in O.C.G.A. § 16-14-7(a). The code section provides, "all property of every kind used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity is subject to forfeiture to the State." *Id.* The provisions for forfeiture allow the seizure and forfeiture of all property, no matter how inoffensive, if said property was acquired with racketeering proceeds. The forfeitures are made because the personal property was realized through or derived from the crime in question. *See Western Business Systems, Inc. v. Slaton*, 492

F.Supp. 513 (N.D.Ga. 1980).

This third requirement, rather than giving officers unbridled discretion, merely is a codification of the plain view doctrine as endorsed by this Court as recently as the decision in *Texas v. Brown*, ____ U.S. ____, 103 S.Ct. 1535 (1983). In that case, this Court stated the following:

> As these cases indicate, "plain view" provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment (footnote omitted). "Plain view" is perhaps better understood, therefore, not as an independent "exception" to the warrant clause, but simply as an extension of whatever the prior justification for an officer's "access to an object" may be.

Id., 103 S.Ct. at 1540-41. Therefore, officers may observe an object while executing a search warrant, or, seize an item acting pursuant to some other exception to the warrant clause. *See, e.g., Warden v. Hayden, supra.* There are circumstances under which officers may need no justification under the Fourth Amendment for their access to the item, as when the property is left in a public place. *See Payton v. New York, supra.*

The same principles that apply in a normal plain view situation also would apply under the circumstances of a search and subsequent seizure for forfeiture under the RICO statute. The theory behind the plain view doctrine is that once an officer has observed an object in plain view, the remaining interests of the owner in the object are merely those of possession and ownership. *Texas v. Brown, supra*, 103 S.Ct. at 1541. The doctrine also "reflects the fact that requiring police to obtain a warrant once they have obtained a first-hand perception of contraband, stolen property or incriminating evidence generally would be a 'needless inconvenience' (cite omitted)

that might involve danger to the police and public." *Id.*, citing *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971). Therefore, this Court has recognized that "in light of the private and governmental interests . . . our decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place officers perceive a suspicious object, they may seize it immediately." *Texas v. Brown, supra*, 103 S.Ct. at 1541. This is merely an application of the requirement of reasonableness under the Fourth Amendment to the law governing seizures of property.

It can thus be seen that the third requirement of the statute on forfeiture is merely a codification of the plain view doctrine as set forth by this Court. Once the officers are in the position to be conducting a lawful search as outlined under the second requirement of this statute, the principles of "plain view" allow the officers to seize evidence that they come across during the course of their search for the specified items. The specification by the statute in question allowing the officers to determine if the property is subject to forfeiture is no different from a traditional plain view application in which the officers determine if an item is contraband or is incriminating in some evidentiary fashion. Therefore, this statute clearly does not exceed permissible Fourth Amendment parameters.

This Court has recognized that "the seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." *Payton v. New York, supra*, 445 U.S. at 587. Items subject to forfeiture may be dealt with in a fashion similar to contraband, evidence or weapons under the circum-

stances previously described. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974). Such seizure, even without prior notice and a hearing, does not offend due process in certain specified circumstances, including the necessity to secure governmental or societal interests. *Id.* Therefore, an officer conducting an otherwise lawful search, as under a search warrant in the instant case, may seize contraband, evidence, weapons or items subject to forfeiture under the prescribed circumstances even though these items are not specifically listed in the search warrant.

The statute in question sets out a fourth requirement for the seizure of property. Under the fourth requirement the officer must also have probable cause to believe that the property will be lost or destroyed if not seized. This requirement is simply a codification of the "exigent circumstances" requirements recognized by this Court in numerous settings. This Court has recognized this principle in creating the automobile exception in *Carroll v. United States*, 267 U.S. 132 (1925), which was subsequently followed in *Chambers v. Maroney*, 399 U.S. 42 (1970). The exigent circumstances exception has also been recognized in "hot pursuit" situations as set forth in *Warden v. Hayden, supra*. The search incident to arrest exception has also been recognized by this Court in *Chimel v. California, supra* and *New York v. Belton*, 453 U.S. 454 (1981).

An examination of the statute as a whole and the requirements set forth in the statute show that, rather than granting unbridled discretion to police officers or being an overbroad provision for seizure, the statute merely codifies Fourth Amendment principles set forth by this Court in numerous cases. The four requirements all fall

within the parameters of the Fourth Amendment to the United States Constitution and the decisions previously set forth by this Court. The search in the instant case met the requirements of the statute as it was conducted pursuant to a lawful search warrant,[3] was made by officers authorized to enforce the penal laws of this state, the officers had probable cause to believe that the property in question would be subject to forfeiture and the officers had probable cause to believe that the property would be lost or destroyed if not seized as much of the evidence was in the nature of papers and documents readily destroyed. Therefore, Respondent submits that the statute in question is constitutional on its face and the search conducted pursuant to the warrant and under this statute was lawful.

B. THE NATURE OF THE SEARCH CONDUCTED.

In addition to the challenge to the statute itself, Petitioners have asserted that all evidence seized should have been suppressed as the search was in the form of a "general" search prohibited by the decisions of this court. Petitioners primarily rely upon this Court's decision in *Stanford v. Texas*, 379 U.S. 476 (1965) for this proposition. Respondent asserts that as the searches conducted were lawful and made pursuant to a valid search warrant, the mere fact that certain of the evidence was returned to the Petitioner does not render the entire search

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[3] Although Petitioners have asserted that this Court should remand for a consideration of the lawfulness of the search warrant, as noted previously, this issue was not raised in the petitions for writs of certiorari initially filed in this Court; therefore, Respondent urges this Court to not consider this issue at this time.

and seizure invalid.[4]

In *Stanford v. Texas, supra*, a warrant was issued under a particular Texas statute which the Court noted was "a sweeping and many-faceted law which, among other things, outlaws the Communist Party and creates various individual criminal offenses. . . ." *Id.* at 477. A warrant was obtained under this statute and four hours were spent gathering up over half of the books found in the house. Officers also took possession of private documents and papers, but did not find any records of the Communist Party or party lists and dues payments. *Id.* at 480. This Court concluded that the search was invalid "for we think it is clear that this warrant was of a kind which it was the purpose of the Fourth Amendment to forbid—a general warrant." *Id.* Thus, the decision focused on the nature of the warrant itself in addition to the nature of the search conducted.

The Court concluded that the requirement of particularity for a warrant was to be scrupulously adhered to when the things to be seized were books and the basis for the seizure was the ideas contained in the books. *Id.* at 485. As the Court noted, in that case no contraband of any kind was ordered to be seized, but merely literary material concerning the Communist Party. "The indiscriminate sweep of that language is constitutionally intolerable." *Id.* at 486. Thus, rather than this Court concluding that the nature of the search itself rendered the warrant a general warrant, the conclusion was reached that the warrant on its face authorized a general search. In the initial petitions for writs of certiorari, filed in this

[4] The state never specifically conceded at trial that any evidence was improperly seized, but merely noted that the evidence would not be utilised by the state and that the documents were not instrumentalities of crime *per se*. (S.T. 630).

Court, the Petitioners specifically stated, "The search warrant issued here was not a general warrant on its face. The things to be discovered were described with particularity." (Petitions for writs of certiorari at 14). Thus, the warrant itself is not called into question. The only issue presented is whether the fact that the officers seized items, allegedly outside the warrant, based on the forfeiture provisions of the RICO statute, would render the search and the warrant invalid.

The Eleventh Circuit Court of Appeals addressed somewhat similar concerns in *United States v. Wuagneux*, 683 F.2d 1343 (11th Cir. 1982). In that case, the court noted the following:

> At the same time, the Supreme Court has recognized that effective investigation of complex white-collar crimes may require the assembly of a "paper puzzle" from a large number of seemingly innocuous pieces of individual evidence: "The complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession."

Id. at 1349, quoting *Andresen v. Maryland*, 427 U.S. 463, 481 n. 10 (1976). The Eleventh Circuit Court of Appeals went on to note that the magnitude of the search by itself would be insufficient to establish a constitutional violation. *Id.* at 1352. The relevant inquiry was whether the search and seizure in question was reasonable under the circumstances.

All circumstances of the search and seizure should be considered, not solely the scope of the search. *See United States v. Heldt*, 668 F.2d 1238, 1254 (D.C. Cir. 1981). In *United States v. Heldt*, the court recognized that a fla-

grant disregard for the limitations of the warrant could possibly transform the search into a general search. In that case the court noted that there were some items seized outside the warrant, but there was not such a flagrant disregard for the terms of the warrant which would justify the drastic remedy of total suppression. *Id.* at 1259. The court also noted that the plain view doctrine allowed the officers to go outside the literal words of the warrant. *Id.* at 1266. The Eleventh Circuit Court of Appeals also noted that absent a flagrant disregard for the terms of the warrant, seizure of items outside the scope of the warrant would not affect the admissibility of items properly seized. *United States v. Wuagneux*, *supra* at 1353.

As noted by the Supreme Court of Georgia, "there is no requirement that where evidence has been lawfully seized it must be suppressed if officers unlawfully seized other material, unless the unlawfully seized evidence led to discovery of the evidence which was admitted." *Waller v. State*, *supra*, 303 S.E.2d at 440. There simply is no question in the instant case of derivative evidence, therefore, this Court should not extend the exclusionary rule to suppress all evidence seized in the instant case.

A further concern in this case involves the type of crime in question as well as the type of seizure involved. The statute involved in this case is specifically a civil statute providing for civil forfeiture proceedings. The procedures under this statute are governed by the Georgia Civil Practice Act. Under this statute, all personal property realized through or derived from organized crime may be seized and subject to forfeiture. *Western Business Systems Inc. v. Slaton*, *supra*. This forfeiture provision arises under a specified statute designed for

the particular purpose of inhibiting organized crime. In enacting the RICO statute, the General Assembly of Georgia established the following:

> The General Assembly declares that the intent of this chapter is to impose sanctions against this subversion of the economy by organized criminal elements and provide compensation to private persons injured thereby. It is not the intent of the General Assembly that isolated incidents of misdemeanor conduct be prosecuted under this chapter but only an interrelated pattern of criminal activity, the motive or effect of which is to derive pecuniary gain. This chapter shall be construed to further that intent.

O.C.G.A. § 16-14-2(b). Under the federal RICO statute, a similar legislative intent can be found. "The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States*, ___ U.S. ___, 104 S.Ct. 296 (1983). This Court recognized in that decision that the forfeiture provisions of the federal RICO statute include all profits and proceeds of racketeering enterprises. *See* 18 U.S.C. § 1963(a)(i). The Georgia statute has a similar intent and purpose to the federal RICO statute. The Georgia General Assembly, like Congress, recognized the need to fashion new remedies in order to achieve the far-reaching objective of combatting organized crime.

Respondent submits that the search in question was conducted pursuant to a valid search warrant which was specifically not a general warrant on its face. The scope of the search itself should not be sufficient for this Court to take a drastic approach to the application of the exclusionary rule and exclude all evidence seized. The officers did not act in flagrant disregard of the provisions of

the warrant, but acted pursuant to the warrant and pursuant to the forfeiture provisions of the Georgia RICO statute. In light of the purposes intended to be served by both the Georgia and federal RICO statutes, Respondent would urge this Court to uphold the searches in question and conclude that there was no requirement that all evidence seized under said searches be suppressed at trial.

CONCLUSION

For all of the above and foregoing reasons, the convictions and sentences of the Petitioners should be affirmed and this Court should affirm the decision of the Supreme Court of Georgia.

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CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, a member of the Bar of the Supreme Court of the United States and Counsel of Record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for the Respondent upon the Petitioners by depositing copies of same in the United States mail with proper address and adequate postage to:

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This 17th day of February, 1984.

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Nos. 83-321 & 83-322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GUY WALLER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

CLARENCE COLE, *et al.*,

Petitioners,

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STATE OF GEORGIA,

Respondent.

On Writs Of Certiorari to the Supreme Court of the State of Georgia

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On Writs Of Certiorari to the Supreme Court of the State of Georgia

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

I. The State Has Failed To Justify the Closure Order Entered Below.

1. The State's attempt to justify the closure order entered below is completely unpersuasive, resting almost entirely on the assertion that closure was required under O.C.G.A. § 16-11-64(b)(8). The Georgia Supreme Court, as petitioners have noted, expressly *declined* to decide whether that statute required

closure. (*See* Pet. Brief at 7, *quoting* J.A. 23a.) There was no finding by the Georgia Supreme Court that § 16-11-64(b)(8) even authorized, much less required, closure in the circumstances of this case.[1]

The State's only other justification for closure is the trial court's supposed "balancing" of the "various concerns" that the State now suggests were involved. (*See* Ga. Brief at 20.) But the trial court balanced nothing. In ordering closure, it relied exclusively on § 16-11-64(b)(8); it was the Georgia Supreme Court that offered the *post hoc* rationalization for closure on which the State now relies. Nothing in the record supports the State's claim that closure was necessary "to preserve order and decorum in the courtroom and to protect the rights of parties involved in the case." (Ga. Brief at 20.) The trial court itself did not find, and on this record could not have found, that any such interests required closure.

2. The United States concedes that petitioners' objections to the trial court's closure order "may be well taken." (U.S. Brief at 18 n.14.) But it asserts that a new trial is not an "appropriate" remedy and that petitioners are "at most . . . entitled to a new, public suppression hearing," to be followed by a new trial only if the second suppression hearing "reaches a different result from the first one." (*Id.* at 21 n.14.) It should be obvious, however, that this proposed "remedy" is in fact no remedy at all. The trial court on remand would have enormous incentive to rule against the petitioners on their motion to suppress, regardless of the merits of their claims; the hearing on

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[1] The entire seven-day suppression hearing was closed, not simply the two-and-one-half hours during which the State played its tapes. Moreover, as petitioners noted at p. 20 n.28 of their brief, even if § 16-11-64(b)(8) were construed to disable the prosecution from later using wiretap evidence because it had been presented in an open suppression hearing, that fact would not by itself give rise to a state "interest" justifying closure, for a state law in effect requiring closure to facilitate future prosecutions would itself have to be measured against the Constitution's guarantees of openness. The Georgia Supreme Court did not decide, however, that § 16-11-64(b)(8) required closure in this case and thus the issue of whether, so construed and applied, that statute is constitutional is not before this Court. The State, while relying on § 16-11-64(b)(8), simply assumes its constitutionality; petitioners, on the other hand, submit that the State's reliance on the statute is wholly misplaced. (*See also* Pet. Brief at 6 n.8.)

remand would thus be reduced to a *pro forma* ratification of the prior adverse decision. Where, as here, a suppression hearing has been improperly closed, no means short of vacating the defendant's conviction and remanding for public proceedings can redress the violation of his rights. *See United States* v. *Ruiz-Estrella*, 481 F.2d 723, 725-26 (2d Cir. 1973).[2]

Moreover, like discrimination in the selection of a grand jury, denial of a defendant's right to public criminal proceedings "strikes at the fundamental values of our judicial system and our society as a whole." *Rose* v. *Mitchell*, 443 U.S. 545, 556 (1979). *See Press-Enterprise Co.* v. *Superior Court*, 104 S. Ct. 819, 822-24 (1984). When a defendant demonstrates discrimination in the selection of the grand jury, the remedy is not to set aside his conviction only if a new grand jury, properly constituted, does not indict him a second time: "[W]here sufficient proof of discrimination . . . has been made out and not rebutted, this Court uniformly has required that the conviction be set aside and the indictment returned by the unconstitutionally constituted grand jury be quashed." 443 U.S. at 551. The same rule should apply when a suppression hearing has been improperly closed.[3]

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[2] Apart from its manifest inefficacy, the remedy suggested by the United States is premised on the mistaken assumption that a defendant whose public trial rights have been violated is entitled to a new trial only if he can demonstrate prejudice—here, that his motion to suppress would have been granted if the hearing had been open. Yet it has long been "the settled rule of the federal courts that a showing of prejudice is not necessary for reversal of a conviction not had in public proceedings." *Levine* v. *United States*, 362 U.S. 610, 627 n.* (1960) (Brennan, J., dissenting on other grounds). *See, e.g., Tanksley* v. *United States*, 145 F.2d 58, 59 (9th Cir. 1944). *See also Douglas* v. *Wainwright*, 714 F.2d 1532, 1542 (11th Cir. 1983) (*dictum*), *cross-petitions for certiorari filed*, Nos. 83-817 & 83-995.

[3] Petitioners submit that the Third Circuit erred in failing to set aside the defendant's conviction in *United States ex rel. Bennett* v. *Rundle*, 419 F.2d 599, 608-09 (3d Cir. 1969) (*en banc*). The court there held that the proper remedy for a state trial court's denial of a public *Jackson* v. *Denno* hearing was a new, public hearing, to be followed by a new trial (or dismissal of the indictment) only if the new hearing resulted in a finding that the defendant's confession was not admissible. In so holding, the court mechanically applied this Court's remedy for an inadequate hearing on the voluntariness of a defendant's confession, *see Jackson* v. *Denno*, 378 U.S. 368, 391-96 (1964), and did not consider whether vindication of the Constitution's guarantees of openness required that the defendant's conviction be set aside.

II. The State Has Failed To Justify Its Forfeiture Statute

Neither the State nor any of the *amici* has answered petitioners' fundamental challenge to O.C.G.A. § 16-14-7(f) —that its probable cause requirement is purely nominal, inadequate to safeguard against wholesale seizures such as occurred here. Although, as the United States observes, property seized without genuine probable cause "can be returned" (U.S. Brief at 9), the statute remains an open invitation to wholesale seizures. So long as literally everything in a person's home *might* be "property subject to forfeiture," § 16-14-7(f) offers no protection against seizures without probable cause.[4]

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[4] Although the United States suggests that the constitutionality of § 16-14-7(f) is not properly before the Court, the fact is that the Georgia Supreme Court specifically held the statute valid "as applied" to the petitioners (J.A. 21a), and one of the State's agents testified at trial that at least some property was seized pursuant to the statute, and not the warrants. (*See* Pet. Brief at 24 n.32.)

The United States also errs in asserting that "it is not contested that the search warrants were valid" (U.S. Brief at 16), for petitioners attacked the validity of the warrants in the trial court, asserting, *inter alia*, that the warrants were a pretext for general searches and wholesale seizures (*see, e.g.*, S.T. 638) (attacking motive of State agents executing warrants). In the Georgia Supreme Court, petitioners explicitly argued that the warrants had been executed in bad faith as part of a pre-search plan to search for and seize anything that the executing officers, in their sole and unbridled discretion, felt might be evidence of assets against which forfeiture actions might be brought. (*See* Pet. Brief at 28 n.42.) As petitioners have noted, the trial court flatly refused to pass on the validity of the warrants (*see id.* at 9), and the Georgia Supreme Court also avoided the issue. Thus, the United States has no cause to wonder "on what grounds [the courts below] could possibly have held that the search warrants were invalid." (U.S. Brief at 8 n.3.)

Because the trial court refused to pass on the validity either of the warrants or of the searches and seizures undertaken by the police (*see, e.g.*, S.T. 624-25), petitioners cannot say with precision which places searched, or which things seized, were outside the scope of the warrants. Nor is it possible, for the same reason, for petitioners to point to particular evidence improperly admitted against them at trial. Absent a determination by the trial court as to the validity and proper scope of the warrants, petitioners are unable to particularize such errors, except to reiterate their claim, not passed upon by the courts below, that the warrants themselves were invalid. Petitioners note that theirs was among the property indiscriminately seized by the police. (*See, e.g.*, S.T. 644-48.)

For these reasons, petitioners submit that they are entitled, at a minimum, to an order vacating the judgment below and remanding for an

(footnote continues)

Only last Term this Court held facial invalidation to be appropriate even when a state law, challenged as impermissibly vague on its face, admits of some constitutional applications. *Kolender* v. *Lawson,* 103 S. Ct. 1855, 1858-59 & n.8 (1983); *see id.* at 1865-66 (White, J., dissenting). In striking down the law, the Court stressed that it flouted "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Id.* at 1858. A law telling police that they may seize anything in a person's home so long as they follow the law—which in effect is what § 16-14-7(f) says—does not satisfy that requirement, and must inevitable produce abuses such as those here. If "property subject to forfeiture" is to be so broadly defined, it is constitutionally imperative to interpose a magistrate's determination, based on *genuine* probable cause, to assure that seizures under Georgia's RICO statute remain within constitutional bounds. (*See* Pet. Brief at 27.)[5]

Much as the United States may wish to minimize the severity of the erroneous deprivations of property encouraged by the statute (U.S. Brief at 9), such deprivations violate not only the Fourth Amendment but also due process, *see, e.g., Fuentes* v. *Shevin,* 407 U.S. 67, 88-90 (1972); *Sniadach* v.

(footnote continued)

assessment of their claim that the warrants, the entry, and any seizures pursuant to the warrants, were—even apart from those pursuant to the RICO statute—invalid. (*See* Pet. Brief at 24.) The United States itself suggests such a course. (U.S. Brief at 21.) The trial court's refusal to pass upon petitioners' challenges is, of course, fairly subsumed under the questions presented in the petitions for certiorari and is, in any event, subject to review as plain error. *See, e.g., Washington* v. *Davis,* 426 U.S. 229, 238 & n.9 (1976); *Procunier* v. *Navarette,* 434 U.S. 555, 559-60 n.6 (1978).

[5] It is precisely because, under certain circumstances, "all property" belonging to a person is subject to levy to satisfy a federal tax deficiency that this Court found no problem with certain of the warrantless seizures in *G.M. Leasing Corp.* v. *United States,* 429 U.S. 338, 349-51 (1977), cited by the United States at pp. 5 & 13 of its brief. Nothing about such property need be "suspicious" to permit warrantless seizure; there need only be probable cause to believe that it *belongs* to the taxpayer. By contrast, it is the association of property with "a pattern of racketeering activity" that alone renders it subject to forfeiture under O.C.G.A. § 16-14-7(a), and petitioners submit that police are simply incapable of determining whether or not otherwise innocent property has some association with "a pattern of racketeering activity" so as to permit warrantless seizure. (*See* Pet. Brief at 24-27.)

Family Finance Corp., 395 U.S. 337, 342 (1969); *id.* at 342-43 (Harlan, J., concurring), and they can scarcely be justified by the possibility that *other* violations constitutional rights could be *worse*. (*See* U.S. Brief at 9-11.)[6]

III. The State Has Failed To Show That Everything Seized Should Not Have Been Suppressed

The record shows clearly that the agents who raided petitioners' homes *treated* the warrants under which they acted (or the warrants in combination with the statute) as *general* warrants. This is not a situation in which, as the United States suggests, application of a rule mandating suppression of everything seized would "penalize an error in the execution of a warrant." (U.S. Brief at 16.) Here the trial court specifically found that the State's agents "just went in and took everything that was in sight." (S.T. 638.) The agents themselves admitted that they ignored the warrants' description of the things to be seized. (*See* Pet. Brief at 3 n.3.) If ever there were a case in which "the police did not confine their search in good faith to the objects of the warrants" (U.S. Brief at 17), this is it. Suppression of everything that was seized is therefore the appropriate remedy, as the Ninth Circuit held on similar facts in *United States* v. *Rettig*, 589 F.2d 418, 423 (9th Cir. 1978)—a case that neither the State nor any of the *amici* elected to address.

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[6] Contrary to the suggestion of the United States at pp. 16-18 of its brief, petitioners vigorously dispute the lawfulness of the searches undertaken by the police, inasmuch as petitioners contest the validity of the underlying warrants. (*See* p. 4 n.4, above.) Moreover, the United States is incorrect in claiming that this Court has "unequivocally held that due process does not require a pre-seizure hearing when the government seizes items subject to forfeiture." (U.S. Brief at 14.) To the contrary, as petitioners noted in their brief at p. 28 & n.41, this Court in *Calero-Toledo* made clear that, absent an "extraordinary" situation, notice and hearing *are* required for seizure even of property used for unlawful purposes. *See* 416 U.S. at 680. In *United States* v. *Eight Thousand Eight Hundred & Fifty Dollars*, 103 S. Ct. 2005 (1983), the Court reaffirmed the *Calero-Toledo* test. *Id.* at 2011 n.12. Petitioners submit that O.C.G.A. § 16-14-7(f) is not limited to seizures made in "extraordinary situations," and that its requirement that an officer seizing "property subject to forfeiture" have probable cause to believe that the property will be "lost or destroyed if not seized" is a purely nominal protection, which cannot save the statute from facial invalidation. (*See* Pet. Brief at 28.)

CONCLUSION

For the foregoing reasons, and for the reasons stated in their principal brief, the convictions of the petitioners should be set aside.

Respectfully submitted,

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STATE OF GEORGIA,

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ON WRITS OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF GEORGIA

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether the Georgia Racketeer Influenced and Corrupt Organizations Act (O.C.G.A. § 16-14-7(f)) facially violates the Fourth and Fourteenth Amendments to the United States Constitution, by delegating to police officers executing a search warrant unbridled discretion to search for and seize anything they choose to seize, and whether the searches and seizures, as conducted in this case under the authority of that statute, were unconstitutionally general.

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Counsel for

petitioners and the respondent, and letters of consent of the parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. (AELE), as a national not-for-profit citizens organization is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* fifty-six times in the Supreme Court of the United States, and thirty-three times in other courts, including the U.S. District and Courts of Appeals and the Supreme Courts of California, Illinois, Ohio and Missouri.

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC. (IACP) is the largest organization of police executives and administrators in the world, consisting of more than 14,000 members in 75 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to improve the delivery of vital police services, while at the same time protecting the rights of all citizens.

THE LEGAL FOUNDATION OF AMERICA (LFA) is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

Amici's specific interest in the instant case arises from our concern that the statute in question, which is a state RICO (Racketeer/Influenced and Corrupt Organizations Act) statute patterned in part after the federal RICO statute, will be limited or abrogated. We believe that the statute fully comports on its face with the probable cause, particularity and reasonableness requirements of the Fourth Amendment, and that the search conducted in the instant case factually conformed to the requirements of the Fourth Amendment.

We bring to the attention of the Court that such statutes are a centrally important tool in the arsenal of state and federal law enforcement agencies in the fight against the spreading cancer of organized crime in our society. As noted by Professor G. Robert Blakey of the University of Notre Dame Law School, an eminent legal scholar and authority on the subject, such statutes are essential "... in rooting out patterns of organized crime, gang activity, and other schemes which have proven difficult to prosecute." "*Proposed State RICO Bill Opposed by CBA*," Chicago Daily Law Bulletin, Chicago, Illinois, October 31, 1983, p. 1. Without such statutes the efforts of the states to cope with organized crime would be crippled beyond repair.

STATEMENT

Petitioners were indicted and convicted on charges of violation of the Georgia Racketeer Influenced and Corrupt Organizations Act.

The facts in the record show that between June, 1981, and January, 1982, petitioners participated in a gambling organization which conducted a lottery based on the daily stock and bond volume on the New York Stock Exchange. This "lottery" was conducted in the metropolitan Atlanta area. Gambling information was transmitted by electronic means and stored in a micro-computer maintained by one of the petitioners.

In the courts below, *inter alia,* the petitioners made a facial attack upon O.C.G.A. § 16-14-7(f). The Supreme Court of Georgia, however, held that:

> A seizure under this section is allowed only in carefully prescribed circumstances. The seizure must be incident to a lawful arrest, search or inspection, and the officer must have probable cause to believe that the property is subject to forfeiture or that the property will be lost or destroyed if not seized. There is no Fourth Amendment problem with the seizure of the fruits of a lawful search or inspection. The statute on its face provides that the search or inspection must be lawful. This requires that the search be pursuant to a warrant, incident to a lawful arrest, or in the presence of other exigent circumstances, which would render the search or inspection "lawful." By definition, therefore, the statute complies with the Fourth Amendment.
> *Waller et al.* v. *State,* 251 Ga. 124, 303 S.E. 2d at 440.

Additionally, the Georgia Court ruled that the statute was constitutionally applied and that if some evidence seized outside the warrant was properly suppressed there was no basis for suppressing other evidence that had been properly seized.

The Georgia Court also ruled that the petitioners' Sixth Amendment right to a public trial was not violated when the trial court closed a suppression hearing after concluding that closure was necessary to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and to further the administration of justice. *Amici* do not address this issue since it is outside the scope of our respective organizations' interests.

SUMMARY OF ARGUMENT

O.C.G.A. § 16-14-7(f) is facially valid because seizures are allowed only in carefully prescribed circumstances, i.e., incident to a lawful arrest, search or inspection, and a police officer must

possess probable cause to believe that the property is subject to forfeiture or will be lost or destroyed if not seized. This conforms to the requirements of the Fourth Amendment. Seizure of contraband, evidence, or weapons not listed in a search warrant by a police officer executing an arrest or search warrant does not violate the Due Process Clause of the Fourteenth Amendment even in the absence of notice and hearing. The seizure in the instant case comported with the statute and the evidence was properly held admissible. The forfeiture statute in question is essential to state law enforcement interests in mounting an effective campaign against organized crime activities that are difficult to control through conventional criminal code charges.

ARGUMENT

THE STATUTE IS FACIALLY VALID UNDER THE FOURTH AMENDMENT BECAUSE IT SPECIFICALLY PROVIDES THAT THE SEARCH OR INSPECTION MUST BE LAWFUL, THERE IS CLEARLY A REQUIREMENT THAT THE SEARCH BE MADE EITHER PURSUANT TO A WARRANT, INCIDENT TO A LAWFUL ARREST, OR UNDER OTHER EXIGENT CIRCUMSTANCES WHICH WOULD RENDER THE SEARCH OR INSPECTION LAWFUL, AND THE SEARCH CONDUCTED IN THIS CASE CONFORMED TO FOURTH AMENDMENT REQUIREMENTS.

Amici will not reiterate the legal arguments made by the respondent in this case, although we are in accord with such arguments and wish to associate ourselves and express our support for them. We confine ourselves to the policy aspect of the statute and the Fourth Amendment issues raised by it.

The pertinent portion of the statute, which is an integral part of the Georgia RICO forfeiture statute, provides:

> (f) Seizure may be effected by a law enforcement officer authorized to enforce the penal laws of this state prior to the filing of the complaint and without a writ of seizure if the seizure is incident to a lawful arrest, search, or inspection and the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if not seized. Within ten days of the date of seizure, the seizure shall be reported by the officer to the district attorney of the circuit in which the seizure is effected; and the district attorney shall, within 30 days of receiving notice of seizure, file a complaint for forfeiture. The complaint shall state, in addition to the information required in subsection (e) of this Code section, the date and place of seizure.
>
> O.C.G.A. § 16-14-7(f).

As noted, this subsection is part of a detailed, specific statutory procedure for seizure and forfeiture of property used

in organized crime activities. It sets forth four specific conditions precedent to the seizure of property.

The first condition is that the seizure be made by a law enforcement officer authorized to enforce the penal laws of Georgia. There can be no constitutional complaint with this condition.

The second requires that the seizure be made incident to a lawful (1) arrest, (2) search, or (3) inspection. The use of the term "lawful" in describing the attendant arrest, search or inspection is clearly in compliance with the Fourth Amendment and gives clear direction to a law enforcement officer that his or her conduct must comport with the requirements of the Fourth Amendment.

A third requirement is that the seizing officer must have probable cause to believe that the property is subject to forfeiture as provided in another subsection of the statute, O.C.G.A. § 16-14-7(a), and he may then seize the evidence which is in plain view.

This probable cause requirement for seizure of evidence in plain view was endorsed by the United States Supreme Court last Term in the case of *Texas* v. *Brown*, ____ U.S. ____, 103 S.Ct. 1535 (1983). After noting the rule that if a police officer is in a place where he has a constitutional right to be, such as pursuant to a lawful arrest, search or inspection, and he has probable cause to believe that an object or substance falling into plain view is contraband or evidence, he can seize it without further authority, the Court stated:

> "plain view" provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment. "Plain view" is perhaps better understood, therefore, not as an independent "exception" to the warrant clause, but simply as an extension of whatever the prior justification for an officer's "access to an object" may be. . . .

> The principle is grounded on the recognition that when a police officer has observed an object in "plain view," the owner's remaining interests in the object are merely those of possession and ownership . . . Likewise, it reflects the fact that requiring police to obtain a warrant once they have obtained a first-hand perception of contraband, stolen property or incriminating evidence generally would be a "needless inconvenience," . . . that might involve danger to the police and public. . . . We have said previously that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on . . . Fourth Amendment interests against its promotion of legitimate governmental interests." . . . In light of the private and governmental interests just outlined, our decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately. . . . This rule merely reflects an application of the Fourth Amendment's central requirement of reasonableness to the law governing seizures of property.
>
> ____ U. S. at ____, 103 S. Ct. at 1540-41. (footnotes and authorities omitted).

The Court also stated in *Payton* v. *New York*, 445 U. S. 573 (1980) at 587 that "[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." In addition to the association with criminal activity, an association with activity leading to a statutory forfeiture of property is also within the purview of the plain view doctrine, see, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 679 (1974), and such seizure without prior notice and a hearing does not offend due process ("... in limited circumstances [identified as including the necessity to secure an important governmental or societal interest], immediate seizure of a property interest, without an opportunity for prior hearing, is constitutionally permissible"). Thus, an officer who is executing a valid arrest warrant or a valid search warrant may seize contraband, evidence of a crime, weapons or

items subject to statutory forfeiture under the prescribed circumstances, without these items necessarily being listed in the search warrant.

The fourth and final requirement set forth by the statute is that the officer have probable cause to believe that the property will be lost or destroyed if not seized. In essence, this is an "exigent circumstances" requirement that has been recognized by this Court in various settings, including the automobile exception created in *Carroll* v. *United States*, 267 U. S. 132 (1925) and subsequently followed in *Chambers* v. *Maroney*, 399 U. S. 42 (1970) and *United States* v. *Ross*, 456 U. S. 798 (1982) and other cases, and also in situations involving "hot pursuit", *Warden* v. *Hayden*, 387 U. S. 294 (1967), and searches incident to arrest, *Chimel* v. *California*, 395 U. S. 752 (1969) and *New York* v. *Belton*, 453 U. S. 454 (1981).

In summary, these four conditions precedent do not violate the Fourth Amendment to the United States Constitution and subsection (f) is clearly constitutional on its face.

Additionally, the petitioners contend that the Georgia court should have suppressed all evidence seized rather than only that evidence which it was concluded had been improperly seized. The argument apparently is that this was a general search and everything seized should be suppressed pursuant to the exclusionary rule. *Amici* can only note that the proposed application of the rule is novel and without foundation in the precedents of this Court. The cases that have been cited by the petitioners for this proposition, *Marron* v. *United States*, 275 U. S. 192 (1927), *United States* v. *LaVallee*, 391 F. 2d 123 (2nd Cir. 1968), and *United States* v. *Pinero*, 329 F. Supp. 992 (S. D. N. Y. 1971), do not support it, but stand only for the proposition that particular evidence improperly seized is not admissible, a straight-forward application of the exclusionary rule. As the Supreme Court of Georgia noted in 303 S. E. 2d at

440, "[t]here is no requirement that where evidence has been lawfully seized it must be suppressed if officers unlawfully seized other material, unless the unlawfully seized evidence led to discovery of the evidence which was admitted." There being no fruit of the poisonous tree or derivate evidence aspect to the petitioners' case, this contention should be rejected as groundless.

Amici submit that an equally important concern in this case is law enforcement's—and ultimately Society's— interest in the *type of statute under evaluation.*

The statute is not penal in nature and, in fact, the forfeiture proceedings contemplated by it are civil and governed by the Georgia Civil Practice Act. Not merely fruits of a crime or contraband, but *any* "personal property realized through or derived from [organized] crime" may be seized and subjected to forfeiture. *Western Business Systems, Inc.* v. *Slaton*, 492 F. Supp. 513, 514 (N. D. Ga. 1980) ("We must keep in mind that these objects may be anything.")

State legislatures are turning to RICO statutes similar to Georgia's as an alternative to traditional criminal penal code sanctions for dealing with organized crime. The reasons are readily apparent. As noted by Professor Blakey, traditional law enforcement methods are hampered by organized crime's especially skillful and practiced arts of secrecy, deception and in some cases, corruption of public officials. See, Blakey, "*The RICO Civil Fraud Action in Context: Reflections on Bennet* v. *Berg*", 58 Notre Dame L. Rev. 237 (1982), and others, Weiner, "*Crime Must Not Pay: RICO Criminal Forfeiture in Perspective*", 1981 N. Ill. U. L. Rev. 225. Such conventional methods are not eminently successful in dealing with organized crime, but actions which can dismantle the property holdings of this illicit empire strike at the heart of its domain—the pocketbook.

This Court recognized and approved of this principle just a few short months ago when it unanimously held in *Russello* v.

United States, ____ U. S. ____, 104 S. Ct. 296, 302 (1983), that the forfeiture provisions of the federal RICO statute (18 U. S. C. § 1963(a)(i)) include the *profits and proceeds* of enterprises, in other words, *all forms of real and personal property derived from racketeering.* ("The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots").

Amici as professional organizations representing state and local law enforcement entities on the front line in the uneven battle against organized crime, respectfully request the Court to extend the rationale of *Russello* to similar state efforts represented by the Georgia statute at bar. We would never ask this Court to approve any such state statute that did not—at the same time—comport with the undiluted requirements of the Fourth Amendment. The Georgia statute simply does not offend that Amendment in any of its particulars. It *does*, however, provide an effective weapon to continue the fight in state forums against this blight. We ask the Court to again add its unanimous voice to that commendable cause by unequivocally approving the type of statute involved in this case and the admissibility of the evidence derived from the seizure made by the law enforcement officers pursuant to the Georgia statute.

CONCLUSION

Amici respectfully submit that the decision of the Supreme Court of Georgia should be affirmed on the facts and the law, and on the basis of sound judicial and public policy.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-321

GUY WALLER,

Petitioner,

-vs-

STATE OF GEORGIA,

Respondent,

AND

NO. 83-322

CLARENCE COLE, W.B. BURKE,
EULA BURKE, and ARCHIE THOMPSON,

Petitioners,

-vs-

STATE OF GEORGIA,

Respondent.

On Writ of Certiorari to the
Supreme Court of Georgia

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INTEREST OF AMICUS CURIAE

This brief is submitted on behalf of the State of Arizona by its Attorney General.[1] The law of the State of Arizona recognizes that forfeiture is a powerful weapon in curtailing the diversion of wealth from licit channels.

Arizona enacted an Organized Crime Act in 1978. The Act authorizes civil in rem forfeiture of any property or interest acquired through a violation of the Act.

Arizona also has adopted a provision in its criminal code that allows for seizure and forfeiture of property relating to drug offenses. Seizure without process

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1. The assistance in the preparation of this brief of Professor G. Robert Blakey of the Notre Dame Law School and Mr. Matthew Schultz (Notre Dame '84), Mr. Paul G. Kolesnikovas (Notre Dame '84) and Ms. Judith A. Morse (Notre Dame '86) is hereby acknowledged.

may be made under specified circumstances.

Arizona argues in this brief that its laws as well as those of its sister States and the Federal Government are consistent with the United States Constitution.

STATEMENT

Petitioners were indicted along with numerous others on February 9, 1982, by the Grand Jury of Fulton County, Georgia, on charges of violating the Georgia Racketeer Influenced and Corrupt Organizations Act ("Georgia RICO Act"), codified at Ga. Code Ann. § 26-3401, et seq.[2/] Petitioners were found guilty

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2. The petitioners were indicted under the Ga. Code Ann. § 26-3401 et seq. After the indictment, the Georgia Code of 1981 became effective and reenacted the RICO Act at O.C.G.A. § 16-14-1 et seq. This brief cites the new Georgia Code of 1981 throughout.

under the Georgia RICO Act of commercial gambling and communicating gambling information.

Prior to trial, a hearing on a motion to suppress was held. The Court granted the State's motion to close the proceedings after the State asserted that the litigation of the motion would involve the introduction of electronically seized evidence that would affect other individuals not on trial or not indicted at that time.

After the trial and convictions, Petitioners filed a direct appeal to the Supreme Court of Georgia challenging, not only the closure of the courtroom, but also the seizure of property under O.C.G.A. § 16-14-7(f). The Court affirmed the conviction and sentences.

A motion for rehearing was denied on June 28, 1983. Petitions for writ of

certiorari were granted by this Court on November 7, 1983.

The questions, posed by petitioners, are:

1. Whether closure and exclusion of the public from portions of defendant's trial for seven days, over the opposition of the defendant and without any showing by the prosecution that closure was necessary to achieve an overriding governmental interest, violates the Sixth Amendment to the United States Constitution.

2.(a) Whether O.C.G.A. § 16-14-7(f) facially violates the Fourth and Fourteenth Amendments to the United States Constitution, because it delegates to the police officers executing a search warrant unbridled discretion to search for and seize anything they choose to seize.

3. Subsumed under this question is whether the searches and seizures, as conducted in this case under the authority of that statute, were general.

The attention of this Amicus brief will be directed solely toward question 2(a).

SUMMARY OF ARGUMENT

Legislative and other investigations into organized crime and related areas have revealed that criminal activity generates large sums of illicit funds. These funds are, in turn, invested in legitimate business and used to obtain political influence. This influence results in corruption of business and political integrity and in concentration of wealth in criminal control.

Both Congress and State legislatures have passed statutes aimed at curtailing the flow of illicit funds. The Federal Government and many of these States

employ civil forfeiture of property connected with crime. Some statutes permit seizure of assets without a warrant in order to enforce these laws effectively. The Georgia RICO statute is one of them.

The Georgia statute permits seizure of property without a warrant during legal searches when the law enforcement officer determines with probable cause that the property is subject to forfeiture and will be lost or destroyed. The statute must be construed constitutionally if possible. The statute requires a legal search and does not permit the officer to intrude into privacy without prior legal justification. The statute merely authorizes the officer to exercise limited discretion concerning what to seize. The exercise of this power is consistent with this Court's plain view

doctrine and generally accepted principles of particularity. Possible illegal application in particular cases should not void the statute on its face.

ARGUMENT

I. RACKETEERING[3] ACTIVITY RESULTS IN THE DIVERSION OF THE NATION'S WEALTH.

The enactment of RICO statutes on the Federal and State levels has resulted from national concern with the general impact of organized criminal activity on the nation, but particularly its effect upon the national economy.

In 1965, President Lyndon Baines Johnson established the President's Commission on Law Enforcement and

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3. "Racketeering" is used here in the generic sense. The American Heritage Dictionary of the English Language 580 (P. Davies ed. 1979) ("racket" "an illegal or dishonest practice"; "racketeer" "one engaged in an illegal business"); United States v. Culbert, 435 U.S. 371, 375 (1978).

Administration of Justice, which examined the effects of organized and other forms of crime on the national economy. After assessing its impact[4] the President's Commission recommended that a national strategy against organized crime be developed. The Commission found:

> Law enforcement's way of fighting organized crime has been primitive compared to organized crime's way of operating. Law enforcement must use methods at least as efficient as organized crime's. The public and law enforcement must make a full-scale commitment to destroy the power of organized crime groups. The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 200 (1967) (hereinafter Challenge).

The President's Commission recommended that Congress and the States enact

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4. See generally President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Crime and Its Impact--An Assessment (1967) (hereinafter Impact).

legislation to curtail organized criminal activity. Id. at 293-301. Congress enacted the Organized Crime Control Act of 1970 ("Federal RICO Act"), Public Law 91-452, 91st Cong., 84 Stat. 922 (1970), codified in relevant part at, 18 U.S.C. §§ 1961-1968 (1976), and the Comprehensive Drug Abuse Prevention and Control Act of 1970 ("Federal Drug Control Act"), Public Law 91-513, 91st Cong., 84 Stat. 1236 (1970), codified in relevant part at, 21 U.S.C. § 801-966 (1976). Both statutes provide for criminal forfeiture of property connected with organized criminal activity. The Federal Drug Control Act also provides for civil forfeiture. Similar legislation has been widely adopted at the State level.

A. Economic Impact of Racketeering.

1. Drug Trafficking.

In 1967, the President's Commission

reported that drug addicts spent $350 million on drugs. Impact at 53. The National Narcotics Intelligence Consumers Committee reported that the retail sale of drugs generated $48 billion in revenue in 1977, $50 billion in 1978, and $64 billion in 1979. National Narcotics Consumers' Committee, The Supply of Drugs to the U.S. Illicit Market from Foreign and Domestic Sources in 1979 (with Projections for 1980-83) 5 (hereinafter Drugs). The amount continues to rise. Attorney General William French Smith recently reported that gross drug sales nationwide in 1980 approached $79 billion, which is equivalent to the combined profits of America's 500 largest industrial corporations. Pileggi, There's No Business Like Drug Business, New York, Dec. 13, 1982, at 38 (hereinafter Drug Business).

2. White Collar Crime.

The President's Commission also considered the impact that various forms of white collar crime had on the economy, but reported that it was difficult to ascertain the amount of money involved. Impact at 102-104. Other organizations have since tried to estimate the costs.

In 1974, the U.S. Chamber of Commerce found that white collar crime cost $41.78 billion, and it published the following breakdown:

Bankruptcy Fraud	$.08 billion
Bribery, Kickbacks, Payoffs	3 billion
Computer Fraud	.10 billion
Consumer Fraud, Illegal Competition, and Deceptive Practices	21 billion
Credit Card and Check Fraud	1.1 billion
Embezzlement	7 billion
Insurance Fraud	2 billion

Receiving Stolen Property	3.5 billion
Securities Theft and Fraud	4 billion

Chamber of Commerce of the United States, White Collar Crime: Everyone's Problem, Everyone's Loss 6 (1974).

3. Redistributing Stolen Property.

Organized criminal groups are involved in both theft of property and its redistribution. Blakey and Goldsmith, Criminal Redistribution of Stolen Property, 74 Mich. L. Rev. 1511, 1538-42 (1976) (hereinafter Blakey and Goldsmith). Organized criminal groups may account for less than ten percent of certain kinds of thefts, but their activities may account for as much as ninety percent of its dollar value. Pennsylvania Crime at 167.

4. Gambling.

In 1967, the President's Commission estimated the money involved in illegal gambling to be $20 billion annually.

Other estimates place the amount from $7-50 billion. Impact at 52-53. Estimates vary greatly because of the difficulty in measuring gambling activity. The Commission also estimated that profits from illegal gambling were approximately one-third of gross revenue. Id.

B. Political and Social Effects.

Without reviewing all aspects of illegal activity, it can be seen that organized crime and similar groups acquire tremendous amounts of wealth from racketeering activities. This wealth may then be poured back into the illegal activities or invested in legitimate endeavors. An ordinary business cannot compete with a tainted enterprise that has ready access to untaxed revenue from narcotics, gambling and other activities

and uses racketeering techniques to advance its affairs.

II. LEGISLATURES HAVE USED FORFEITURE TO CURTAIL THE DIVERSION OF THE NATION'S WEALTH.

Congress in 1970 enacted two major pieces of legislation in an effort to combat the enormous growth of organized crime, the Federal RICO Act, codified in relevant part at, 18 U.S.C. §§ 1961-1968 (1976), and the Federal Drug Control Act, codified in relevant part at, 21 U.S.C. §§ 801-966 (1976). Since organized crime presented a pressing national problem, law enforcement had to be given all appropriate weapons. Fines and imprisonment are not always effective criminal sanctions in dealing with the flow of illicit funds. Forfeiture of property connected with criminal activity, however, could remove the

profit motive from the crime, if the forfeiture was effectively enforced.[5] Soon after the Federal legislation, States joined in the fight against organized crime by enacting their own forfeiture provisions.

A. Forfeiture as a Tool for Fighting Crime.

Two types of forfeiture provisions are currently employed in legislation, criminal and civil. In 1790, the First Congress prohibited certain types of common law criminal forfeitures. Act of

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5. It has not always been effectively enforced. United States General Accounting Office, Asset Forfeiture--A Seldom Used Tool in Combatting Drug Trafficking at 30-42 (1981). The problems are threefold: (1) uncertain status of assets, (2) third party holdings, and (3) dissipation prior to seizure. United States General Accounting Office, Stronger Federal Efforts Needed in Fight Against Organized Crime 31-34 (1981).

April 30, 1790, c. 9, § 24, 1 Stat. 117. On the history of criminal and civil forfeiture, see Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-90 (1974); Note, Bane of American Forfeiture Law--Banished at Last?, 63 Cornell L. Rev. 768 (1977). As a result, criminal forfeitures played little role in law enforcement on the Federal level for 180 years. Congress, however, resuscitated criminal forfeiture in 1970 by enacting RICO and Section 848 of the Drug Control Act. Civil forfeitures have played a revenue and law enforcement role since the launching of the Republic.

Civil forfeiture is directed, not against the defendant, but against specified property. It requires a court judgment. The accepted legal theory behind civil forfeitures is that they are a proceeding against the "guilty"

property, an in rem proceeding. Justice Story in upholding civil in rem forfeitures held that such forfeitures were independent of any criminal action taken against anyone. The Palmyra 25 U.S. (12 Wheat.) 1, 14-15 (1827).

The constitutional validity of in rem civil forfeitures is settled beyond serious question. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

B. The Variety of Forfeitures Used in American Law.

1. Federal RICO

Forfeitures used in American law that are pertinent to the case at bar are: the Federal RICO Act, the Federal Comprehensive Drug Abuse Prevention and Control Act, various State RICO statutes (ten of which allow civil forfeitures, and six of those ten facially allow

seizure without process) and state narcotics acts and the Uniform Controlled Substance Act.

C. This Court's Construction of the Georgia RICO Forfeiture Provision Will Necessarily Extend to Similar Federal and State Legislation.

The Georgia RICO statute permits an officer to seize property when the officer has probable cause to believe the property is subject to forfeiture and when the property will be lost or destroyed if not seized. The Georgia civil forfeiture provision is not an anomaly. The impact of a decision declaring Georgia's forfeiture provision facially unconstitutional will extend beyond Georgia.

In fact, the Georgia RICO statute may afford officers less discretion than many other statutes, since the Georgia statute

explicitly requires that the property be subject to loss or destruction if not seized. An exigent circumstances requirement is, therefore, written on the face of the statute.

Civil forfeiture is a powerful tool that legislatures have adopted in curtailing the flow of illicit funds. Depriving criminals of their illegal gains reduces the incentive to conduct criminal enterprises.[6]

III. THE GEORGIA STATUTE PROVIDING FOR WARRANTLESS SEIZURES IS NOT UNCONSTITUTIONAL ON ITS FACE.

The Georgia RICO statute provides for civil forfeiture of "all property of

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6. See R. Posner, Economic Analysis of Law § 7.6 at 176 (2d ed. 1977) ("[T]o the extent that profits earned in organized crime can be safely invested in legitimate activities to yield additional profits, the expected return to organized crime [in its illicit activities] is higher than it would otherwise be.").

every kind used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity." O.C.G.A. § 16-14-7(a). Appendix A. A "pattern of racketeering activity" is defined in detail by reference to other specific provisions of law. O.C.G.A. §§ 16-14-3(2), 16-14-3(3). Appendix A. The statute provides for seizure of property according to a procedure spelled out in the RICO statute and in the Georgia Civil Practice Act. O.C.G.A. § 16-14-7(b). The forfeiture procedure begins either with a complaint filed by the district attorney or with a warrantless seizure by a police officer. O.C.G.A. §§ 16-14-7(d), 16-14-7(e), 16-14-7(f). If the procedure begins with a complaint, a court must determine with reasonable cause that the property is subject to

forfeiture and must provide notice to all parties having or claiming an interest in the property, except where the court determines that notice would result in loss or destruction of the property. O.C.G.A. § 16-14-7(e). This procedure provides for a preseizure judicial determination of reasonable cause and notice, as long as notice does not jeopardize the forfeiture itself.

Where the procedure begins with warrantless seizure, while a preseizure judicial determination is not required, the police officer must still obey the Fourth Amendment, that is, he must have probable cause to believe that the property is subject to forfeiture, and he must determine that the property will be lost or destroyed if not seized. O.C.G.A. § 16-14-7(f). The statute also requires that the district attorney file

a complaint within a reasonable time after seizure. Id.

A. This Court Must Uphold a Statute if a Constitutional Interpretation is Possible.

The Georgia RICO statute must, of course, comply with the Fourth Amendment. When construing this statute, this Court must, however, favor any constitutional interpretation over an interpretation that would void the statute. If a statute has two possible interpretations, the constitutional interpretation should prevail. This has always been the approach taken by this Court. See Califano v. Yamasaki, 442 U.S. 682, 693 (1980) (citing Crowell v. Benson, 285 U.S. 22, 62 (1932)); Parsons v. Bedford, 28 U.S. (3 Pet.) 432, 448 (1830) (Story, J.).

B. The Georgia Statute Requires that Seizure Take Place During a Legal Search

that Otherwise Complies with the Warrant Requirement or with a Well-Recognized Exception.

The Georgia statute authorizes warrantless seizure of property only during a legal search. The seizure must take place during a search that does not otherwise violate the Fourth Amendment. The statute does not delegate to police officers the power to extend searches beyond their legal boundaries in order to seize forfeitable property. Cf. Lo-Ji Sales Inc. v. New York, 442 U.S. 319, 325-26 (1979) (Warrant that authorized search for obscenity beyond designated material too general).

1. An Officer Applying the Georgia RICO Statute does not have Discretion to Extend the Scope of the Search.

Legal searches include searches authorized by warrant or searches that

fall within certain well-recognized exceptions, including search incident to arrest, consent, and exigent circumstances. C. Whitebread, Criminal Procedure § 4.03(e) at 108 (1980) (six exceptions). The extent that an officer can invade a person's privacy during such a search is strictly limited by the foundation of the search itself. On its face, therefore, the statute does not give the officer discretion, but instead it carefully regulates such discretion.

2. Seizure of Property Without a Warrant is Permitted Under the Plain View Doctrine.

Officers may, however, exercise an appropriately circumscribed power to seize when they lawfully search for property. Officers can seize property specified in a warrant; they may also seize certain property that falls in

plain view. Property seized under the plain view doctrine must meet specific requirements developed in Coolidge v. New Hampshire, 403 U.S. 443 (1971). Justice Stewart's plurality opinion placed clear limitations on the officer's discretion concerning what can be seized. The officer must discover the item inadvertently during a legal search and it must be immediately apparent that the item is incriminating. Id. at 466. See also, Texas v. Brown, 103 S.Ct. 1535, 1540-43 (1983) (inadvertence element questioned). Accordingly, this Court's plain view doctrine constitutionally permits officers to seize evidence, fruits and instrumentalities of crime and contraband. Id. at 1540.

Under the plain view doctrine, the United States Constitution permits an officer an appropriate measure of

discretion in the first instance in determining probable cause concerning what property can be seized. Any deviation from the requirements of the plain view doctrine results in an illegal seizure under the Constitution and nothing in the Georgia statute seeks to justify any other procedure.

C. The Georgia Lesiglature Has Not Delegated Too Much Discretion to Police.

The Georgia RICO statute provides for forfeiture of all property connected with a pattern of racketeering activity. O.C.G.A. § 16-14-7(a). Appendix A. Forfeiture of property connected with criminal activity is constitutional, and in certain cases, preseizure notice need not be given to persons with interests in the property. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 677-80 (1974).

Legislatures have appropriately delegated authority to law enforcement officers to seize property during legal searches without warrants since the early days of the Constitution. For example, the First Congress declared that imported goods were subject to duties and that the goods would be forfeited if the duties were not paid. The Congress also authorized the collector of duties to search vessels and seize goods without a warrant. This early Act required collectors to obtain a warrant to search homes, but it gave the collectors discretion to search vessels and seize goods aboard without judicial process. Act of July 31, 1789, c. 5, § 24, 1 Stat. 43.

A legislature can give police discretion to seize property when a legitimate State interest in the property

is at stake. See Calero-Toledo, 416 U.S. at 678-79. These interests include asserting in rem jurisdiction for civil forfeiture over property used for illicit purposes, enforcing criminal sanctions, and preventing loss or destruction of the property. Id. at 679. See also, Fuentes v. Shevin, 407 U.S. 67, 91 (1972).

Legislatures cannot, of course, authorize an unconstitutional search and seizure simply to promote efficient law enforcement. The much feared general warrant would result if legislatures could authorize unreasonable warrantless searches and seizures. G.M. Leasing, 429 U.S. at 355. But legislatures can authorize the seizure of property if police are given guidelines to follow when exercising discretion. Id. at 357-58. A general warrant does not result when a legislature limits a police officer's discretion to seize property in

plain view.

The Georgia RICO statute authorizes police to seize property connected with racketeering activity. Racketeering activity is specifically defined. O.C.G.A. § 16-14-3(3). Appendix A. The officer must determine that the property is connected with that racketeering by the probable cause standard and must determine that the property will be lost or destroyed if not seized. Identifying the property subject to seizure as such hardly seems an insuperable task, absent a First Amendment consideration, here not present. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 325-26 (1979); Stanford v. Texas, 379 U.S. 476, 485 n. 16 (1965); Marcus v. Search Warrant, 367 U.S. 717, 730-31 (1961). "It is enough if the description is such that the officer . . . can with reasonable effort ascertain" what is to be seized.

Steele v. United States, 267 U.S. 498, 503 (1925) (general description of place and thing held adequate).

CONCLUSION

The Georgia RICO statute's forfeiture provision limits warrantless seizures to legal searches and to property that can be seized under the plain view doctrine. These limitations require that the law enforcement officers apply the statute constitutionally. Violations of the Fourth Amendment in particular cases should not void the statute on its face.

Respectfully submitted this 23rd day of February, 1984.

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APPENDIX A

Georgia RICO (Racketeer Influenced and Corrupt Organizations) Act ch. 26-34 provides:

26-3402 [16-14-3] Definitions

(2) "Pattern of racketeering activity" means engaging in at least two incidents of racketeering activity that have the same or similar intents, results, accomplices, victims or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after July 1, 1980, and that the last of such incidents occurred within four years, excluding any periods of imprisonment, after the commission of a prior incident of racketeering activity.

3(A) "Racketeering activity" means to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit any crime which is chargeable by indictment under the following laws of this state:

(i) Article 2 of Chapter 13 of this title, relating to controlled substances;
(ii) Article 3 of Chapter 13 of this title, known as the "Dangerous Drugs Act";
(iii) Subsection (j) of Code Section 16-13-30, relating to marijuana;
(iv) Article 1 of Chapter 5 of

this title, relating to homicide;

(v) Article 2 of Chapter 5 of this title, relating to bodily injury and related offenses;

(vi) Article 3 of Chapter 7 of this title, relating to arson;

(vii) Code Section 16-7-1, relating to burglary;

(viii) Code Section 16-9-1, relating to forgery in the first degree;

(ix) Article 1 of Chapter 8 of this title, relating to theft;

(x) Article 2 of Chapter 8 of this title, relating to robbery;

(xi) Code Sections 16-6-9 through 16-6-12 and 16-6-14, relating to prostitution and pandering;

(xii) Code Section 16-12-80, relating to distributing obscene materials;

(xiii) Code Section 16-10-2, relating to bribery;

(xiv) Code Section 16-10-93, relating to influencing witnesses;

(xv) Article 4 of Chapter 9 of this title and Code Sections 16-10-20, 16-10-23, 16-10-91, and 16-10-95, relating to perjury and other falsifications;

(xvi) Code Section 16-10-94, relating to tampering with evidence;

(xvii) Code Section 15-12-22,

relating to commerical gambling;

(xviii) Code Section 3-3-27, relating to distilling or making liquors;

(xix) Part 2 of Article 4 of Chapter 11 of this title, known as the "Georgia Firearms and Weapons Act";

(xx) Code Section 16-8-60, relating to unauthorized transfers and reproductions of recorded material;

(xxi) Code Section 10-5-24, relating to violations of the "Georgia Securities Act of 1973";

(xxii) Code Section 3-3-27, relating to the unlawful distillation, manufacture, and transportation of alcoholic beverages;

(xxiii) Code Sections 16-9-31, 16-9-32, 16-9-33, and 16-9-34, relating to the unlawful use of financial transaction cards;

(xxiv) Code Section 4-3-90, relating to certain felonies involving certificates of title, security interest, or liens concerning motor vehicles;

(xxv) Code Section 4-4-21, relating to removal or falsification of identification numbers;

(xxvi) Code Section 40-4-22, relating to possession of motor vehicle parts from which the identification has been removed;

(xxvii) Code Section 16-9-70,

relating to use of an article with an altered identification mark;

(xxviii) Article 6 of Chapter 9 of this title, known as the "Georgia Computer Systems Protection Act"; or

(xxix) Any conduct defined as "racketeering activity" under 18 U.S.C. 1691 (1)(A), (B), (C), and (D).

(B) "Racketeering activity" shall also mean any act or threat involving murder, kidnapping, gambling, arson, robbery, theft, receipt of stolen property, bribery, extortion, obstruction of justice, dealing in narcotic or dangerous drugs, or dealing in securities which is chargeable under the laws of the United States or any of the several states and which is punishable by imprisonment for more than one year.

26-3405 [16-14-7] Forfeiture

(a) All property of every kind used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity is subject to forfeiture to the State. Forfeiture shall be had by a civil procedure knows as a RICO forfeiture proceeding under the following rules.

(b) A RICO forfeiture proceeding shall be governed by Chapter 11 of Title 9, the "Georgia Civil Practice Act" except to the extent that special rules of procedure are stated in this chapter.

(c) A RICO forfeiture proceeding shall be

an in rem proceeding against the property.

(d) A RICO forfeiture proceeding shall be instituted by complaint and prosecuted by the district attorney of the county in which the property is located or seized. The proceeding may be commenced before or after seizure of the property.

(e) If the complaint is filed before seizure, it shall state what property is sought to be forfeited, that the property is within the jurisdiction of the court, the grounds for forfeiture, and the names of all persons known to have or claim an interest in the property. The court shall determine ex parte whether there is reasonable cause to believe that the property is subject to forfeiture and that notice to those persons having or claiming an interest in the property prior to seizure would cause the loss or destruction of the property. If the court finds that reasonable cause does not exist to believe the property is subject to forfeiture, it shall dismiss the complaint. If the court finds that reasonable cause does exist to believe the property is subject to forfeiture but there is not reasonable cause to believe that prior notice would result in loss or destruction, it shall order service on all persons known to have or claim an interest in the property prior to a further hearing on whether a writ of seizure should issue. If the court finds that there is reasonable cause to believe that prior notice would cause loss or destruction, it shall without any further hearing or notice, issue a writ of seizure directing the sheriff of the county where the property is found to seize it.

(f) Seizure may be effected by a law enforcement officer authorized to enforce the penal laws of this state prior to the filing of the complaint and without a writ of seizure if the seizure is incident to a lawful arrest, search, or inspection and the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if not seized. Within ten days of the date of seizure, the seizure shall be reported by the officer to the district attorney of the circuit in which the seizure is effected; and the district attorney shall, within a reasonable time after receiving notice of seizure, file a complaint for forfeiture. The complaint shall state, in addition to the information required in subsection (e) of this Code section, the date and place of seizure.

(g) After the complaint is filed or the seizure effected, whichever is later, every person known to have or claim an interest in the property shall be served, if not previously served, with a copy of the complaint and a notice of seizure in the manner provided by Chapter 11 of Title 9, the "Georgia Civil Practice Act." Service by publication may be ordered upon any party whose whereabouts cannot be determined.

(h)(1) Any person claiming an interest in the property may become a party to the action at any time prior to judgment whether named in the complaint or not. Any party claiming a substantial interest in the property may upon motion be allowed by the court to take possession of the property upon posting bond with

good and sufficient security in double the amount of the property's value conditioned to pay the value of any interest in the property found to be subject to forfeiture or the value of any interet of another not subject to forfeiture. Such a party taking possession shall not remove the property from the territorial jurisdiction of the court without written permission from the court.

APPENDIX B

Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 881, provides:

§ 881. Forfeitures

(a) Subject property

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of

property described in paragraph (1) or (2), except that --

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter; and

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any state.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a

controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(b) Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims.

Any property subject for forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when--

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property has been used or is intended to be used in violation of this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

APPENDIX C

Uniform Control Substances Act, 9 U.L.A. 195 (1979), provides:

§ 505 [Forfeitures]

(a) the Following are subject to forfeiture:

(1) all controlled substances which have been manufactured, distributed, dispensed or acquired in violation of this Act;

(2) all raw materials, products and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this Act;

(3) all property which is used, or intended for use, as a container for property described in paragraphs (1) or (2);

(4) all conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of property described in paragraph (1) or (2), but:

(i) no conveyance used by any person as a common carrier in the transaction of business

as a common carrier is subject to forfeiture under this Secton unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this Act;

(ii) no conveyance is subject to forfeiture under this Section by reason of any act or omission established by the owner thereof to have been committed or omitted without his knowledge or consent;

(iii) a conveyance is not subject to forfeiture for a violation of Section 401(c); and,

(iv) a forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if he neither had knowledge of nor consented to the act or omission.

(5) all books, records, and research products and materials, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this Act.

(b) Property subject to forfeiture under this Act may be seized by the [appropriate person or agency] upon process issued by any [appropriate court] having jurisdiction over the property. Seizure without process may be made if:

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based upon this Act;

(3) the [appropriate person or agency] has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the [appropriate person or agency] has probable cause to believe that the property was used or is intended to be used in violation of this Act.

APPENDIX D

Title 49 of the United States Code provides:

§ 782. Seizure and forfeiture

Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited: Provided, That no vessel, vehicle, or aircraft used by any person as a common carrier in the transaction of business as such common carrier shall be forfeited under the provisions of this chapter unless it shall appear that (1) in the case of a railway car or engine, the owner, or (2) in the case of any other such vessel, vehicle, or aircraft, the owner or the master of such vessel or the owner or conductor, driver, pilot, or other person in charge of such vehicle or aircraft was at the time of the alleged illegal act a consenting party or privy thereto: Provided further, That no vessel, vehicle, or aircraft shall be forfeited under the provisions of this chapter by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such vessel, vehicle, or aircraft was unlawfully in the possession of a person who acquired possession thereof in violation of the criminal laws of the United States, or of any state.

§ 783. Designation of officers by Secretary of Treasury; duties of officers

The Secretary of the Treasury is empowered to authorize, or designate, officers, agents, or other persons to carry out the provisions of this chapter. It shall be the duty of any officer, agent, or other person so authorized or designated, or authorized by law, whenever he shall discover any vessel, vehicle, or aircraft which has been or is being used in violation of any of the provisions of this chapter, or in, upon, or by means of which any violation of this chapter has taken or is taking place, to seize such vessel, vehicle, or aircraft and to place it in the custody of such person as may be authorized or designated for that purpose by the Secretary of the Treasury, to await disposition pursuant to the provisions of this chapter and any regulations issued hereunder.

APPENDIX E

Title 8 of the United States Code provides:

§ 1324. Bringing in and harboring certain aliens

(b) Seizure and forfeiture of conveyances; exceptions; officers and authorized persons; disposition of forfeited conveyances; suits and actions

(1) Any conveyance, including any vessel, vehicle, or aircraft, which is used in the commission of a violation of subsection (a) of this section shall be subject to seizure and forfeiture, except that--

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to the illegal act; and

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any

person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States or of any State.

(2) Any conveyance subject to seizure under this section may be seized without warrant if there is probable cause to believe the conveyance has been used in a violation of subsection (a) of this section and circumstances exist where a warrant is not constitutionally required.

APPENDIX F

Internal Revenue Code provides:

§ 7321. Authority to seize property subject to forfeiture

Any property subject to forfeiture to the United States under any provision of this title may be seized by the Secretary or his delegate.

§ 7323. Judicial action to enforce forfeiture

(a) Nature and venue.--The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the United States District Court for the district where such seizure is made.

APPENDIX G

Title 33 of the United States Code provides:

§ 385. Seizure and condemnation of vessels fitted out for piracy

Any vessel built, purchase, fitted out in whole or in part, or held for the purpose of being employed in the commission of any piratical aggression, search, restraint, depredation, or seizure, or in the commission of any other act of piracy, as defined by the law of nations, shall be liable to be captured and brought into any port of the United States if found upon the high seas, or to be seized if found in any port or place within the United States, whether the same shall have actually sailed upon any piratical expedition or not, and whether any act of piracy shall have been committed or attempted upon or from such vessel or not; and any such vessel may be adjudged and condemned, if captured by a vessel authorized as mentioned in section 386 of this title to the use of the United States, and to that of the captors, and if seized by a collector, surveyor, or marshal, then to the use of the United States.

§ 387. Duties of officers of customers and marshals as to seizure

The collectors of the several ports of entry, the surveyors of the several ports of delivery, and the marshals of the several judicial districts within the

United States, shall seize any vessel or boat built, purchased, fitted out, or held as mentioned in section 385 of this title, which may be found within their respective ports or districts, and to cause the same to be proceeded against and disposed of as provded by that section.

Nos. 83-321 and 83-322

In the Supreme Court of the United States

OCTOBER TERM, 1983

GUY WALLER, PETITIONER

v.

STATE OF GEORGIA

CLARENCE COLE, ET AL., PETITIONERS

v.

STATE OF GEORGIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether Ga. Code § 16-14-7(f) is unconstitutional on its face in authorizing the seizure of private property incident to a lawful arrest, search, or inspection if "the officer has probable cause to believe the property is subject to forfeiture."

2. Whether the seizure of items not specified in a valid search warrant requires the suppression of items seized under the authority of the warrant.

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INTEREST OF THE UNITED STATES

The Georgia statute challenged here is closely patterned after the federal civil forfeiture statute relating to controlled substances offenses, 21 U.S.C. 881. The federal statute authorizes the warrantless seizure

of forfeitable property on the basis of probable cause, 21 U.S.C. 881(b)(4), and hence petitioners' contentions cast doubt upon its constitutionality as well. By the same token, the question of suppressing evidence seized pursuant to a valid warrant because other items were improperly seized in the course of executing the warrant arises in federal cases as well as state cases.

In addition, while this brief does not treat the issue in detail or take a position on its proper disposition in the circumstances of this case, the question presented concerning the closure to the public of the suppression hearing potentially implicates policies embodied in two federal statutes, the Classified Information Procedures Act, 18 U.S.C. App. III, at 549 *et seq.* and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520. See note 14, *infra*.

STATEMENT

After a long investigation of suspected gambling operations, Georgia law enforcement officers simultaneously executed search warrants at numerous locations in early January 1982. The probable cause underlying the warrants was based largely on evidence obtained from a series of court-authorized wiretaps. The searches uncovered considerable evidence of criminal activity, and petitioners were indicted and charged with violating the Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act, Ga. Code §§ 16-14-1 to 16-14-15 (1982 & Cum. Supp. 1983), and other gambling statutes.

At trial, petitioners moved to suppress the evidence seized during the searches, primarily on the ground that the wiretaps were invalid. The last two paragraphs of the suppression motions also contended

that the searches and seizures were overbroad and that no seizures could be justified on the basis of Ga. Code § 16-14-7(f), which authorizes warrantless seizures of forfeitable property on the basis of probable cause, because that statute is unconstitutional on its face. See J.A. 8a-12a. At the State's request, the suppression hearing was closed to the public so as to prevent unnecessary publication of the intercepted conversations (see J.A. 13a-18a). The trial court ordered the suppression of items seized during the searches that were beyond the scope of the warrant (see J.A. 21a), but the suppression motions were denied in all other respects (J.A. 19a).[1] Thereafter, petitioners were acquitted on the RICO count but convicted on the charges of commercial gambling and communicating gambling information, in violation of Ga. Code §§ 16-12-22 and 16-12-28 (1982) (J.A. 20a).

The Georgia Supreme Court affirmed (J.A. 20a-28a). Without specifying whether any evidence had been introduced at trial that had been seized pursuant to Section 16-14-7(f), the court held that petitioners

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[1] Petitioners assert (Br. 9) that the suppression order of the district court did not extend to all of the seized items that were beyond the scope of the warrants. We have not had access to the record (other than the Joint Appendix) and thus are not in a position to address whether petitioners continued to claim after the suppression order was entered that additional items should have been suppressed as outside the scope of the warrants. We note, however, that the Georgia Supreme Court obviously was of the view that all the evidence introduced at trial was within the scope of the warrants (see J.A. 21a-22a). Significantly, petitioners' statement of the case in their brief neglects to specify any items of evidence that were seized during the searches of their premises and introduced against them at trial that should have been suppressed as outside the scope of the warrants.

had standing to challenge the constitutionality of the statute, but it rejected that challenge. The court explained that the statute merely authorized the seizure of property discovered in the course of a lawful search on the basis of probable cause to believe that it was forfeitable. Hence, the court held, "[b]y definition * * * the statute complies with the Fourth Amendment." J.A. 21a. The court also rejected petitioners' contention that the evidence lawfully seized pursuant to the search warrants and introduced at trial should be suppressed because other items were seized that were not specified in the warrants (J.A. 21a-22a). The court also upheld the trial court's decision to close the suppression hearing (J.A. 23a).

SUMMARY OF ARGUMENT

I. The seizure provision of the Georgia civil forfeiture statute, Ga. Code § 16-14-7(f) (Cum. Supp. 1983), plainly is constitutional on its face. It does not authorize any search and consequent invasion of privacy whatsoever; it permits the seizure of property on the basis of probable cause to believe that it is forfeitable. Thus, the statute simply reflects the well established rule that if police officers are lawfully present in a particular place and see an object that they have probable cause to seize, they may seize that object immediately. See, *e.g.*, *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983), slip op. 8 (plurality opinion); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 354 (1977). This is because the Fourth Amendment consequences of an erroneous seizure are much less severe than those of an erroneous search. There is an interference only with a possessory property interest, not a privacy interest, and thus it is not necessary to invoke the prophylactic measure of a

warrant and its advance judicial determination of probable cause in order to justify a seizure.

There is no reason why the authority to seize on the basis of probable cause should exist for evidence of a crime or stolen property, but not for forfeitable property. Indeed, this Court has recognized that an innocent object like a car may be seized without a warrant, even if totally unconnected with criminal activity. See *G.M. Leasing Corp.* v. *United States*, *supra*. It may be, as petitioners contend, that the inherently innocent nature of forfeitable property makes it more difficult to establish probable cause than in the case of evidence, but that is no basis for challenging the facial validity of the statute. In those situations where an officer does have probable cause to believe that property is forfeitable, the seizure authority conferred by the Georgia forfeiture statute plainly satisfies the Fourth Amendment. If, conversely, a seizure is made without probable cause, as petitioners suggest happened in this case, that seizure would be unlawful quite without regard to the facial validity of the statute, which does not in any event permit such a seizure. And it is clearly established that a seizure of forfeitable property by a police officer does not violate due process because of the absence of a pre-seizure hearing. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

II. The courts of appeals have consistently held that items seized pursuant to a valid warrant are not to be excluded from evidence merely because the officers conducting the search also seized items not specified in the warrant. See, *e.g.*, *United States* v. *Heldt*, 668 F.2d 1238, 1259-1269 (D.C. Cir. 1981), cert. denied, 456 U.S. 926 (1982); see also *Andresen*

v. *Maryland*, 427 U.S. 463, 482 n.11 (1976). This general principle follows from the rule that evidence is not to be suppressed unless it is the "fruit" of an illegality. Even assuming that complete suppression could be justified in an extreme case where police officers used a narrow warrant as a pretext to conduct a general search, in effect treating it as a general warrant, the record here provides no possible basis for finding that this is such a case. Indeed, petitioners point to no evidence that the *searches* exceeded the authorization of the warrants at all; their allegations focus only on the *seizure* of items outside the scope of the warrants, which is clearly separable from the lawful seizure of other items. In short, the record before this Court provides no basis for suppressing the evidence introduced at trial that was seized in accordance with the search warrants.

ARGUMENT

I. GEORGIA'S FORFEITURE SEIZURE STATUTE IS CONSTITUTIONAL ON ITS FACE

At the outset, we note that it is far from apparent that the question of the constitutionality of the Georgia civil forfeiture statute is properly before this Court. As far as we are aware, all of the evidence introduced at trial was discovered and seized under the authority of valid search warrants or pursuant to wiretaps that are not challenged here. According to the Georgia Supreme Court (J.A. 21a), "[s]uch items as were unlawfully seized were excluded from evidence at trial." Petitioners do not specify any evidence introduced at trial that was the subject of a warrantless seizure under the Georgia forfeiture

statute.[2] Moreover, the gravamen of their complaint seems to be (*e.g.*, Pet. Br. 24-26) that numerous seizures were made that were not supported by probable cause; not only does this raise no issue of the facial validity of the statute, but it fails to implicate the statute even as applied, since the statute does not purport to allow non-probable-cause seizures. Hence, even assuming that the statute is unconstitutional, it is not clear why that should have any effect on the validity of petitioners' convictions, or why this Court would be rendering anything other than an advisory opinion were it to pass upon the issue here.

In any event, petitioners' challenge to the facial validity of Section 16-14-7(f) is groundless. The statute simply allows a law enforcement officer, "incident to a lawful arrest, search, or inspection," to seize property that he has probable cause to believe is subject to forfeiture "and will be lost or destroyed if not seized." Plainly, the statute does not purport to authorize any sort of warrantless *search*; it concerns only the *seizure* of items already discovered by officers in the course of an otherwise lawful search.[3] This type of provision is common in civil forfeiture statutes. The Georgia provision authorizing warrantless seizures on the basis of probable cause is quite

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[2] The only items that petitioners specify as seized under the authority of the civil forfeiture statute (see Br. 24 n.32) are some personal records that were apparently suppressed by the trial court (see Pet. Br. 9; J.A. 19a, 21a) and an automobile that was seized some time after the search warrants were executed and for the purposes of civil forfeiture proceedings not involved here.

[3] Petitioners assert (Br. 24 n.32) that, in light of the trial court's "refusal to pass on the validity of the search warrants," Section 16-14-7(f) must be treated as authorizing "warrant-

similar to the analogous provision in the federal civil forfeiture statute for the fruits and instrumentalities of drug transactions, 21 U.S.C. 881(b)(4), and to forfeiture statutes in almost every state in the country.[4]

A. For purposes of the warrant requirement, there is a sharp constitutional distinction between searches and seizures. Searches involve an interference with

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less entry into a person's home [and] an indiscriminate search of the premises * * *." This characterization of the authority conferred by the statute is patently absurd given the statutory language. Moreover, while we have not had an opportunity to examine the entire record in this case, the facts as revealed in the papers that have been filed make it quite clear that the trial court's action here does not evidence any approval of warrantless searches, whether pursuant to the forfeiture statute or otherwise. The motion to suppress reprinted in the Joint Appendix (at 8a-12a) raised 23 grounds for suppression, 21 of which related to the wiretaps that provided probable cause for the searches that occurred in this case. The other two grounds, including the challenge to the facial validity of the forfeiture statute, focused on the alleged overbreadth of the seizures. Thus, once the trial court decided that the wiretaps were valid (a finding that is not challenged here), it is not apparent on what grounds it could possibly have held that the search warrants were invalid. The entries and accompanying searches were authorized by valid warrants and hence constitutional. The only remaining question for the trial court would appear to have been whether the seizures were overbroad, and, as noted above, it apparently resolved that by suppressing as evidence items seized outside the scope of the warrants.

[4] The federal provision is incorporated in Section 505 of the Uniform Controlled Substances Act, 9 U.L.A. 612-613 (1979). That uniform statute has been substantially adopted by 46 states, plus the District of Columbia, Puerto Rico, and the Virgin Islands. 9 U.L.A. 187-194; *id.* at 78 (Cum. Supp. 1988).

an individual's legitimate expectations of privacy, and thus they implicate the core interest protected by the Fourth Amendment. See, *e.g.*, *Katz* v. *United States*, 389 U.S. 347 (1967). If police officers conduct a search based on their opinion that probable cause exists, and that opinion turns out to have been erroneous, the invasion of privacy has already occurred, and "the ruptured privacy of the victims' homes and effects cannot be restored." *Linkletter* v. *Walker*, 381 U.S. 618, 637 (1965). Because of the severe consequences in terms of Fourth Amendment values of such a miscalculation by the police, the prophylactic measure of a warrant is generally required for searches in order to interpose a judicial determination of probable cause before the intrusion occurs.

Seizures are quite different. A seizure involves no invasion of privacy; it represents rather an interference with an individual's possessory interest in a piece of property. See *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983), slip op. 8 (plurality opinion). If a seizure turns out to be erroneous, the property can be returned, and the only injury is the deprivation of possession for a limited time. Because the Fourth Amendment consequences of an erroneous seizure are not nearly as severe as in the case of an erroneous search, it is generally reasonable to permit seizures—on the basis of probable cause—without advance authorization by a magistrate.[8]

Recognizing these important distinctions between searches and seizures, the Court has followed "the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately." *Texas*

[8] Of course, the police officer's determination of probable cause is still subject to subsequent judicial review.

v. *Brown*, slip op. 8 (plurality opinion). See also *id.* at 2-3 (Stevens, J., concurring); *Payton* v. *New York*, 445 U.S. 573, 587 (1980); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 354 (1977); but see *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 4 (dictum). Indeed, even the more intrusive seizure of a *person* (*i.e.*, an arrest), may be effected in a public place without a warrant. *United States* v. *Santana*, 427 U.S. 38, 41-42 (1976); *United States* v. *Watson*, 423 U.S. 411 (1976). A warrantless seizure may occur in a public place; it may also occur in a place in which an individual has a privacy interest, but only if police officers are already lawfully on the premises and the object seized is in plain view. As long as there is no significant additional invasion of privacy, *i.e.*, if the officer is in a place that he has a right to be and no additional search is effected, the officer may seize on the basis of probable cause without a warrant. See *Texas* v. *Brown*, slip op. 3 (Stevens, J., concurring).

This connection between the warrant requirement and a privacy intrusion is reflected in several of this Court's holdings. In *G.M. Leasing Corp.* v. *United States*, *supra*, the government seized certain property of the taxpayer without a warrant in partial satisfaction of income tax assessments. The Court upheld the warrantless seizure of automobiles on the street (429 U.S. at 350-351), but struck down as violative of the Fourth Amendment the seizure of certain books and records that took place following a warrantless intrusion into the privacy of the taxpayer's offices (*id.* at 352-358). See generally *id.* at 354. Similarly, in *Payton* v. *New York*, *supra*, the Court recognized the general principle that warrantless arrests meet Fourth Amendment requirements, but

held that a warrant was required if executing the arrest would require a search of the home to find the suspect. 445 U.S. at 587-590, 598; *id.* at 603 (Blackmun, J., concurring). And in *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), where the Court held that a warrant was necessary to *search* a suitcase found in an automobile, the Court explained that the police were entitled to *seize* the suitcase on the basis of probable cause pending the issuance of a warrant and, indeed, acted "commendably" (*id.* at 761) in doing so. See *id.* at 764 n.12; see also *United States* v. *Chadwick*, 433 U.S. 1, 13-14 & n.8 (1977).

Against this background, it is clear that the Georgia forfeiture statute is constitutional on its face. The statute does not authorize any warrantless searches. It simply reflects a rule well recognized by this Court—when the police are in a place where they have a right to be and see an item that they have probable cause to believe is seizable because it is subject to forfeiture, they may seize the item immediately without the need to obtain a warrant.

B. Indeed, it is not completely clear upon what theory petitioners base their claim of unconstitutionality (see Pet. Br. 24-28). They appear to concede that the Georgia police would have been permitted to seize *evidence* of a crime without a warrant. But, relying on *Warden* v. *Hayden*, 387 U.S. 294 (1967), petitioners contend that the statute is defective because it authorizes the warrantless seizure of property that is not "clearly incriminating" (Br. 26) and is "without a constitutionally sufficient 'nexus' to criminal behavior" (Br. 27). This unfocused objection cannot withstand analysis.

Surely petitioners are not suggesting that the statute is unconstitutional because it authorizes the seizure of items that are not "evidence" within the

meaning of *Warden* v. *Hayden*; that would mean that forfeitable property could not be seized even with a warrant. But if forfeitable property is seizable, petitioners advance no convincing reason why it may never be seized in the absence of a warrant. The extent to which property is incriminating on its face may well be relevant to the likelihood that probable cause will exist to seize it in a particular case, but it is irrelevant to whether a *warrant* is necessary to seize it, given the existence of probable cause.[6] The legislature determines what property should be taken into custody by officers of the state; given that determination, the Constitution generally prohibits the officers from seizing such property unless they have probable cause to believe that the property is of the character that the legislature has determined should be within the custody of the state. If there is probable cause to believe that the property is seizable, however, the Constitution draws no distinction depending upon the reason for the seizure, *i.e.*, whether the property is evidence of a crime, contraband, or forfeitable.

There is no logical reason why the fact that forfeitable property may not be incriminating on its face should pose a constitutional barrier to its seizure.[7] Just as other information may create prob-

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[6] This Court has clearly cautioned against confusing the strength of probable cause with the need for a warrant before invading a private area. See, *e.g.*, *Agnello* v. *United States*, 269 U.S. 20, 33 (1925).

[7] To the extent petitioners partially rest their argument on the characterization of forfeitable property as lacking a nexus to criminal activity, the factual premise is faulty. Although the statute is a civil forfeiture statute, the definition of forfeitable property is property used or derived from criminal racketeering activity. Ga. Code § 16-14-17(a) (Cum. Supp.

able cause to believe that an apparently innocent item, such as a diamond necklace, is seizable as stolen property (see Pet. Br. 27 n.39), so other information may create probable cause to believe that a diamond necklace is seizable as property subject to forfeiture. Indeed, contrary to petitioners' contention (Br. 27) that the Georgia statute "expand[s] the categories of property subject to seizure without warrant beyond those established by this Court," this Court has unequivocally held that warrantless seizures are not restricted to "clearly incriminating" property or evidence of a crime. In *G.M. Leasing*, the Court upheld the warrantless seizure of an automobile that was not in any sense connected with criminal activity; it was seized merely as an asset of a delinquent taxpayer. *A fortiori*, the Constitution must permit the warrantless seizure of property forfeitable as the proceeds of a criminal transaction.

The crux of petitioners' argument appears to be the assertion that it is difficult for the officer in the field to generate probable cause to believe that property is forfeitable (see Br. 25-26). That may well be, and it may even be that the police in this case seized property under the asserted authority of the forfeiture statute without probable cause (see Pet. Br. 25), in which case any such seizures would violate both the Constitution and the Georgia statute.[8] But that is no basis for attacking the facial validity of the

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1983). Thus, if police have probable cause to believe that property is forfeitable, they similarly have probable cause to believe that the property is " 'associate[d] * * * with criminal activity' " (Pet. Br. 25 (emphasis omitted), quoting *Texas* v. *Brown*, slip op. 10 (plurality opinion); see also *Payton* v. *New York*, 445 U.S. at 587).

[8] We do not see how this Court can assess such a fact-bound contention here, because petitioners have not even specified what evidence they seek to suppress on this ground.

statute. It cannot be denied that situations will arise where police do have probable cause to believe that property is forfeitable—for example, where they observe money change hands in a drug transaction. In such a situation, it is clear that the statutory authorization in Ga. Code § 16-14-7(f) to seize such forfeitable property without a warrant satisfies the Fourth Amendment.

C. Petitioners' brief contention (Br. 27-28) that the Georgia statute violates due process is completely misguided. This Court has unequivocally held that due process does not require a pre-seizure hearing when the government seizes items subject to forfeiture. *United States* v. *Eight Thousand Eight Hundred and Fifty Dollars*, No. 82-1062 (May 23, 1983), slip op. 6 n.12; *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).[9] While it is theoretically possible that a due process problem could arise if a post-seizure hearing were unnecessarily delayed, petitioners make no such allegation in this case. In any event, the Georgia statute appears to provide for prompt forfeiture proceedings, and Section 16-14-7 (i) even provides that a motion to dismiss the proceeding must be acted upon within 10 days.[10]

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[9] The contention that a pre-seizure hearing is required is particularly perverse in the case of the Georgia statute, which permits a warrantless seizure only if the officer believes that the property will be "lost or destroyed if not seized"—*i.e.*, only if there are exigent circumstances that would excuse procurement of a warrant even if one were otherwise required.

[10] Under the federal statute, forfeiture proceedings must be instituted "promptly" if the property is seized on the basis of probable cause without a warrant. 21 U.S.C. 881(b). If an individual believes that his property was seized illegally, he may move immediately for return of the property under Rule 41(e), Fed. R. Crim. P.

II. EVIDENCE SEIZED PURSUANT TO VALID WARRANTS SHOULD NOT BE SUPPRESSED SIMPLY BECAUSE OTHER ITEMS NOT SPECIFIED IN THE WARRANTS WERE ALSO SEIZED

Petitioners briefly contend (Br. 29-30) that all of the evidence seized during the warrant searches should be suppressed because the officers executing the warrant also seized numerous items that were not specified in the warrant. There is no specific factual predicate for this contention,[11] and petitioners point to no findings of the trial court concerning whether, and to what extent, some of the searches and seizures were overbroad. On this record, therefore, petitioners' contention appears to be that an overbroad seizure, as a general rule, requires the suppression even of items specified in the search warrant. This contention is clearly mistaken.

The courts of appeals have consistently held that items seized pursuant to a valid warrant are not to be excluded from evidence merely because the officers conducting the search also seized items not specified in the warrant. See, *e.g.*, *United States* v. *Offices Known As 50 State Distributing Co.*, 708 F.2d 1371, 1376 (9th Cir. 1983), cert. denied, No. 83-568 (Feb. 21, 1984); *United States* v. *Tamura*, 694 F.2d 591, 597 (9th Cir 1982); *United States* v. *Heldt*, 668 F.2d 1238, 1259-1269 (D.C. Cir. 1981), cert. denied, 456 U.S. 926 (1982); *United States* v. *Dunloy*, 584 F.2d 6, 11 n.4 (2d Cir. 1978); *United States* v. *Forsythe*,

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[11] Petitioners do cite (Br. 3 & n.3) a few excerpts of suppression hearing testimony stating that some items outside the scope of the warrant were seized, but it is not clear to what extent the limitations of the warrant were violated or even if these excerpts pertain to searches of *petitioners'* homes (see the last paragraph of the footnote).

560 F.2d 1127, 1134 (3d Cir. 1977); *United States* v. *Mendoza*, 473 F.2d 692, 696-697 (5th Cir. 1972); *United States* v. *Holmes*, 452 F.2d 249, 259 (7th Cir. 1971), cert. denied, 405 U.S. 1016, 407 U.S. 909 (1972). And this Court has implicitly recognized the correctness of these decisions. See *Andresen* v. *Maryland*, 427 U.S. 463, 482 n.11 (1976). These decisions simply follow the well established principle that evidence is not to be suppressed unless it is the "fruit" of an illegality. *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963). Indeed, it would serve no useful purpose—and would seriously impair law enforcement while distorting the actions and judgments of law enforcement agents—to penalize an error in the execution of a warrant by suppressing not only the fruits of that erroneous act but all the evidence seized pursuant to the warrant.

Petitioners provide no relevant authority to support their contrary position. Their reliance (Br. 29) on *Stanford* v. *Texas*, 379 U.S. 476 (1965), is misplaced. In *Stanford*, the police conducted a search under the authority of an impermissibly general warrant, which presents a completely different situation from this case. Because the warrant itself was invalid, there was not even any lawful basis for the officers to enter Stanford's home. Nor in the case of a pure general warrant is there any basis for distinguishing among the items seized and classifying some as lawfully seized, because they are all seized pursuant to the same invalid authorization. Here, by contrast, it is not contested that the search warrants were valid. Thus, the officers lawfully entered onto private premises, and they were authorized to search for and seize those items specified in the warrants. There is no reason why the seizure of additional items

should invalidate those lawful seizures. If the officers had entered and executed the search warrants in an unimpeachable manner and then returned the next day to seize some items not specified in the warrants, it could not seriously be argued that the later illegal seizures would invalidate the fruits of the earlier lawful search. There is no reason to treat the situation here any differently.

Quoting *United States* v. *Heldt*, 668 F.2d at 1259, petitioners contend (Br. 29-30) that a "flagrant disregard" of the limitations of the warrant can require suppression of all the evidence seized and argue that this case meets that standard because the police did not confine their search in good faith to the objects of the warrant. Even assuming that the policies of the exclusionary rule would warrant complete suppression in an extreme case where a narrow warrant authorization is used as a pretext to conduct a general search,[12] it is clear that petitioners have not demonstrated that they are entitled to relief on that basis. Petitioners' objection to the execution of the warrants is focused almost entirely on the allegedly overbroad *seizures*; nothing cited in the record suggests that the *searches* went beyond the authorization of the war-

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[12] Even in such circumstances, it is not clear that an exception to the fruits principle of the exclusionary rule is appropriate. The purpose of the rule is deterrence; knowledge that no profit can be gained from the illegal aspects of a search should, under the hypothesis of the rule, remove the incentive for misconduct. Sometimes the deterrence fails, of course, but the costs associated with suppressing *lawfully* seized evidence have in every other context been thought to outweigh any increment in deterrence that might thereby be obtained, and it is not apparent why a different principle would apply to partially valid, but otherwise overbroad, searches or seizures.

rant.[13] Indeed, petitioners appear to complain (see Br. 3 n.3) that the searches were not extensive enough in that the officers seized entire boxes of records without first sorting through them to separate relevant from irrelevant documents. Thus, petitioners have made no showing that the police officers here used a warrant as a pretext for conducting a general search. In short, the record before this Court provides no basis for suppressing the evidence seized in accordance with the specifications of the valid search warrants.[14]

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[13] Even with respect to the seizures, it is not apparent why the seizures outside the scope of the warrant should be treated as evidence that the officers ignored the terms of the warrant. Petitioners have asserted that these seizures were grounded on the RICO statutory seizure authority (see Br. 24); if so, there is no factual basis whatsoever for asserting that the officers disregarded the limitations of the warrant.

[14] We take no position on the first question presented—whether the trial court's closure of the suppression hearing over petitioners' objection violated their Sixth Amendment right to a public trial. Insofar as petitioners attack the scope of the closure ordered in their case, their claim that it was broader than necessary in the circumstances may be well taken (although not necessarily establishing a *constitutional* violation). We are confident that federal practice would limit the scope of any closure order to that necessary to protect the confidentiality interests at stake. Our concern here, however, is that the Court give due recognition to the fact that there are circumstances in which any right of the defendant to public pretrial proceedings must give way to more weighty competing interests.

This Court has not heretofore had occasion to consider the scope of an accused's Sixth Amendment right to a public trial. Assuming that that right is close to absolute in the context of the *trial* itself (but cf. *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 606-607 (1982) (First Amendment right of public access to trial is not absolute); *Rovinsky* v. *McKaskle*,

722 F.2d 197, 200 (5th Cir. 1984) (dictum)), however, the right to a public *pretrial* hearing must nevertheless be of more limited dimension. Public scrutiny of the presentation of evidence and arguments at the trial implicates the constitutional protection envisaged by the Framers in a way that the public access to pretrial hearings does not. See *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 387-391 (1979). And this Court has recognized in other contexts the difference between pretrial proceedings and the trial itself with respect to the right of the accused to compel the public disclosure of information sought to be kept private. See *McCray* v. *Illinois*, 386 U.S. 300, 311-312 (1967) (informant's privilege). Hence, we submit that important state interests can justify closure (to the minimum extent necessary) of a pretrial hearing. This is particularly so where the interest weighing against public scrutiny of the proceedings is one that derives from a considered legislative policy. In the federal system, there are at least three situations that would require some accommodation of any Sixth Amendment right to public pretrial proceedings.

The Classified Information Procedures Act, 18 U.S.C. App. III, at 549 *et seq.*, establishes procedures to prevent the unnecessary disclosure of classified information in judicial proceedings. Section 6 of the Act provides that the government may request a pretrial in camera hearing to make determinations with respect to the "use, relevance, or admissibility of classified information" at trial (§ 6(a)). If the court determines that the classified information should not be disclosed, the record of the hearing is sealed (§ 6(d)). We think it clear that such a closed hearing could not conceivably violate the Sixth Amendment. See, *e.g.*, *Baker* v. *United States*, 401 F.2d 958, 978 n.91 (D.C. Cir. 1968) (recognizing that portion of suppression hearing may be closed to avoid disclosure of information affecting national security).

By the same token, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, places strict limitations on the use of evidence obtained through electronic surveillance. While conversations intercepted through lawful electronic surveillance may be introduced at trial or disclosed under other strictly limited circumstances (18 U.S.C. 2517), Section 2511(c) makes it a crime to disclose information

obtained by wiretaps not authorized by the statute. Given this statutory scheme, it has been held that a suppression hearing to determine the lawfulness of wiretaps must be closed to the public in order to prevent the disclosure of information obtained by wiretaps that might ultimately be determined to be unauthorized. *United States* v. *Cianfrani*, 573 F.2d 835, 855-857 (3d Cir. 1978); see also *United States* v. *Dorfman*, 690 F.2d 1230, 1232-1234 (7th Cir. 1982). This result clearly appears to be correct. The restrictions on disclosure contained in Title III are in the nature of a privilege designed to protect the privacy interests of those persons whose conversations have been intercepted (see generally *Gelbard* v. *United States*, 408 U.S. 41, 48-52 (1972)); it would entirely defeat the privilege if the conversations had to be disclosed to the public in the course of a proceeding to determine whether or not the privilege exists. We note in this connection that Title III would require the closure of such a hearing to the public (though only to the extent necessary to protect the confidentiality of the recorded conversations) regardless of the content of the conversations. We reject petitioners' suggestion (Br. 21-22) that, where the legislature has created such a privilege against disclosure and it is not waived by the relevant parties, the Sixth Amendment nevertheless requires as a precondition to closure of a pretrial hearing an ad hoc balancing of several factors, including the degree to which the particular conversations at issue implicate privacy interests. Where in camera review is otherwise indicated, the possibly suppressible wiretap evidence should not be publicly disclosed on the basis of a finding that the conversations involved do not implicate a significant privacy interest.

Another situation in which closure of pretrial proceedings would plainly be justified is when grand jury materials have been disclosed to the defense for the purpose of considering a motion to dismiss the indictment because of irregularities in the grand jury proceedings. See Fed. R. Crim. P. 6(e)(3)(C)(ii). Such motions may sometimes require hearings at which testimony and arguments would disclose matters occurring before the grand jury. The Rule provides that any disclosure of grand jury material for these purposes "shall be made in such manner, at such time, and under such conditions as the court may direct," which surely embraces the power

CONCLUSION

With respect to questions 2 and 3 presented by petitioners, the judgment of the Supreme Court of Georgia should be affirmed. Alternatively, because of the state of the record, the writ should be dismissed as improvidently granted with respect to these questions, or the case remanded for development of an adequate record.

Respectfully submitted.

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FEBRUARY 1984

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to exclude the public from any such hearing in order to avoid dissemination of confidential materials beyond the extent necessary to the court's consideration and disposition of the motion.

Finally, we note that petitioners' brief does not address the question of the proper remedy if a Sixth Amendment violation is found. In our view, the general rule that the remedy should be tailored to the violation (see, *e.g.*, *United States* v. *Morrison*, 449 U.S. 361 (1981)) clearly demonstrates that a new trial is not an appropriate remedy. There is no allegation that petitioners' trial on the merits was not "public" as required by the Constitution; at most petitioners should be entitled to a new, public, suppression hearing. Unless that suppression hearing reaches a different result from the first one, there is no basis for vacating their convictions and ordering a new trial.

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Georgia

Docketed: August 26, 1983

Court: Supreme Court of Georgia

Counsel for petitioner: Lister, Charles

Vide: 83-322

Counsel for respondent: Westmoreland, Mary Beth

Entry	Date	Note	Proceedings and Orders
1	Aug 26 1983	G	Petition for writ of certiorari filed.
5	Sep 22 1983		Order extending time to file response to petition until October 12, 1983.
6	Oct 12 1983		Brief of respondent Georgia in opposition filed.
7	Oct 19 1983		DISTRIBUTED. November 4, 1983
8	Nov 7 1983		Petition GRANTED. The case is consolidated with 83-322 and a total of one hour is allotted for oral argument.
			**********
10	Dec 9 1983		Order extending time to file brief of petitioner on the merits until January 18, 1984.
12	Dec 9 1983		Order extending time to file brief of respondent on the merits until February 24, 1984.
14	Feb 14 1984		SET FOR ARGUMENT. Tuesday, March 27, 1984. (3rd case) This case is consolidated with No. 83-322. (1 hour)
16	Feb 16 1984		Joint appendix filed. VIDED.
17	Feb 16 1984		Brief of petitioner filed. VIDED.
18	Feb 21 1984		Brief of respondent Georgia filed. VIDED.
19	Feb 21 1984		Brief amicus curiae of Americans for Effective Law Enforcement, Inc., et al. filed. VIDED.
20	Feb 23 1984		Brief amicus curiae of Arizona filed. VIDED.
21	Feb 27 1984		CIRCULATED.
22	Feb 25 1984		Record filed.
23	Feb 25 1984		Certified transcript of record, Vols. 4, 5, 8, 9, 10, 11, 12 & 13 received. (Box).
24	Feb 21 1984	X	Brief amicus curiae of United States filed. VIDED.
25	Mar 20 1984	X	Reply brief of petitioners Guy Waller filed. VIDED.
26	Mar 27 1984		ARGUED.